108-110

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1047.~~ 694

THE CITY OF OTTAWA, PLAINTIFF IN ERROR,

vs.

WILLIAM H. CARY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 14, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 1047.

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INDEX.

	Original.	Print.
Præcipe for summons	2	1
Bond for cost	2	1
Summons	3	1
Declaration	6	3
Order extending time to plead	14	6
Order granting leave to file pleas and jury waived	15	7
Pleas	16	7
Affidavit of merits	58	25
Special demurrer	59	25
Stipulation as to pleas and to waive jury	60	26
Order, hearing of cause, &c	61	26
further hearing of cause, &c	62	26
taking cause under advisement	63	27
judgment, &c	63	27
Certificate of special findings and exceptions attached	65	28
Certificate to transcript	90	38
Writ of error	91	38
Assignment of errors	92	39
Citation	93	39

1 Pleas in the circuit court of the United States within and for the northern district of Illinois, begun and held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, circuit judge of the United States for the seventh judicial circuit, and the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Friday, the fifteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the one hundred and sixth year.

WILLIAM H. BRADLEY, *Clerk.*

WILLIAM H. CARY
vs.
THE CITY OF OTTAWA. } Debt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the twenty-second day of January, A. D. 1880, came William H. Cary, by G. S. Eldredge, esq., his attorney, and filed in the office of the clerk of the circuit court of the United States for said northern district of Illinois, at Chicago, in said district,
2 his præcipe for a writ of summons against the City of Ottawa, defendant, and also, at the same time, filed in said clerk's office his bond for costs in said entitled cause, which said præcipe and said bond are respectively in the words and figures following, to wit:

Præcipe.

Circuit court of the United States, northern district of Illinois. To March term, A. D. 1880.

WM. H. CARY
vs.
THE CITY OF OTTAWA. } Debt, $60.000. Damages, $50,000.

WM. H. BRADLEY, Esq., *Clerk, &c.:*

Please issue summons as above to U. S. marshal, and file bond for costs.

Jan. 21st, 1880.

Yours, &c.,

G. S. ELDREDGE,
Pl'ff's Att'y.

(Endorsed:) File 1 Jan. 22, 1880. W. H. Bradley, cl'k.

Bond for costs.

Circuit court of the United States, northern district of Illinois.

WM. H. CARY
vs.
THE CITY OF OTTAWA. }

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff

of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for
3 any costs taxed against him.

G. S. ELDREDGE.

Dated this 21st day of January, A. D. 1880.

(Endorsed:) Filed Jan. 22, 1880. W. H. Bradley, cl'k.

Afterwards, on the same day, to wit, on the twenty-second day of January, A. D. 1880, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said summons, with the return thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, ss.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the City of Ottawa, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto William H. Cary, of a plea of debt for $60,000, to his damage, as it is alleged, of fifty thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the
4 Supreme Court of the United States of America, at Chicago aforesaid, this 22' day of January, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the 104th.

[SEAL.] W. H. BRADLEY, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and by these presents do appoint, E. L. Waterman my true and lawful deputy to execute the annexed writ—Wm. H. Cary vs. City of Ottawa—and to make return of the execution thereof according to law.

JESSE S. HILDRUP, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ upon the City of Ottawa, Illinois, in the following manner, to wit: By delivering a true copy thereof to Samuel Richolson (therein named, on the 19th of Feb., A. D. 1880), mayor of said city of Ottawa.

JESSE S. HILDRUP,
By E. L. WATERMAN,
Special Deputy.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

E. L. Waterman, being duly sworn, deposes and says that he
5 served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

E. L. WATERMAN.

Subscribed and sworn to before me this 21st day of Feb., A. D. 1880.

[SEAL.] E. R. RICHARDS,
Notary Public.

(Endorsed:) Filed Feb'y 24, A. D. 1880. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 11th day of February, A. D. 1880, came said complainant, by G. S. Eldredge, esq., his attorney as aforesaid, and filed in said clerk's office his declaration against said defendant in said entitled cause; which said declaration is in the words and figures following, to wit:

6 *Declaration.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court in and for said district, to March term, A. D. 1880.

WILLIAM H. CAREY
vs.
THE CITY OF OTTAWA. } Debt.

And now comes William H. Cary, a citizen of the State of Missouri, by G. S. Eldridge, his attorney, and complains of the City of Ottawa, situate in the county of La Salle, and State of Illinois, a body corporate and politic organized under the laws of the State of Illinois, in a plea of debt, for that, whereas, heretofore, to wit, on the 2nd day of August, A. D. 1869, the said City ot Ottawa, at the district aforesaid, made, executed, and delivered to one W. H. W. Cushman one hundred and twenty of its bonds, or written obligations, each for the sum of five hundred dollars lawful money of the United States of America, bearing date the day and year last aforesaid, one-third of which said bonds were due and payable in five years, one-third in ten years, and one-third in fifteen years from date; and said bonds were numbered respectively from one to one
7 hundred and twenty, inclusive, and each of them signed by Henry A. Scheler, the then mayor of said city, and R. N. Waterman, the then clerk of said city, and attested by the corporate seal of said city, in and by each of which the bonds said defendant acknowleged itself indebted, and promised to pay to said W. H. W. Cushman, or bearer, the sum of five hundred dollars lawful money of the United States of America, at the St. Nicholas National Bank in the city of New York, with interest at the rate of ten per cent., payable annually at said bank, on presentation of the several interest coupons thereto annexed, as they should respectively become due, and which said one hundred and twenty bonds, except with respect to the number and time of payment thereof, were *were* in substance and effect the same as bond No. 5, a copy of which said bond No. 5, is hereto annexed, and made a part of this declaration, and marked Exhibit A.

And the plaintiff further avers that the said defendant executed and delivered, at the time and place aforesaid, to said W. H. W. Cushman, five interest coupons attached to each of forty of said bonds, to wit, bonds numbered one to forty, inclusive, and ten interest coupons attached to each of forty of said bonds, to wit, bonds numbered forty-one to eighty, inclusive, and fifteen interest coupons attached to each of

forty of said bonds, to wit, bonds numbered eighty-one to one hundred and twenty, both inclusive, and numbered to correspond
8 therewith, each of which said coupons was for the sum of fifty dollars, as representing the annual interest on said bonds at the rate of ten per cent. per annum, and each of which said coupons was signed by Henry A. Scheler, the then mayor of said city, and R. N. Waterman, the then clerk of said city, and in and by each of said coupons the said defendant promised to pay bearer the sum of fifty dollars, at the St. Nicholas National Bank in the city of New York, each of which said coupons, except with respect to the number and time of payment thereof, was in substance and effect the same as coupon No. 4, attached to bond No. 5, a copy of which last-mentioned coupon is hereto annexed, and made a part of this declaration, and marked Exhibit B.

And the plaintiff further avers that heretofore, to wit, on the 1st day of January, A. D. 1880, at, to wit, the said City of Ottawa, in the county of La Salle, and State of Illinois, and district aforesaid, he, the said plaintiff, for a valuable consideration, became the purchaser and owner of certain of said bonds and the coupons thereto annexed, to wit, bonds numbered 5 to 40, both inclusive, and bonds numbered 61 and 63, and bonds numbered 65 to 80, both inclusive, and likewise of certain coupons attached to bonds numbered 81 to 120, both inclusive.

And the plaintiff further avers that at the time of the purchase of said last-mentioned bonds there were attached to each of said
9 bonds numbered *number* 5 to 40, both inclusive, two coupons for the sum of fifty dollars each, for the payment of the interest on said bonds due August 2nd, 1873, and August 2nd, 1874.

And the plaintiff further avers that at the time of the purchase of said bonds as aforesaid, there were attached to each of said bonds numbered 61 and 63, and said bonds numbered 65 to 80, both inclusive, seven coupons, for the sum of fifty dollars each for the payment of the interest on said bonds, due on the 2d day of August, in each of the years 1873, 1874, 1875, 1876, 1877, 1878, and 1879.

And the plaintiff further avers that at the time and place aforesaid, he became the purchaser also of seven of the coupons attached to each of the said bonds numbered 81 to 120, both inclusive, for the sum of fifty dollars each for the payment of the interest on said last-mentioned bonds, due on the 2nd day of August, in each of the years 1873, 1874, 1875, 1876, 1877, 1878, and 1879.

And further avers that the said bonds and coupons so purchased as aforesaid by said plaintiff, were long past due before the bringing of this suit, and yet the said defendant being so indebted as aforesaid to the said plaintiff, although often requested so to do, hath not paid the said several sums of money in said bonds and coupons mentioned, nor any nor either of them, nor any part thereof, but the same with large
10 amount of interest thereon, to wit, the said bonds so purchas' by said plaintiff, with interest at the rate of ten per cent. per annum from the time they respectively became due, as aforesaid, and with interest on said coupons so purchased by said plaintiff at the rate of seven per cent. per annum from the time they respectively became due (that being the legal rate of interest by the laws of the State of New York, in which State they were by their terms made payable), wholly neglects and refuses to pay to the injury of the plaintiff of the sum of sixty thousand dollars debt, and the further sum of fifty thousand dollars damages, whereupon he brings suit, &c.

G. S. ELDRIDGE,
Pl'ff's Attorney.

"EXHIBIT A."

No. 5.] THE UNITED STATES OF AMERICA. [$500.

STATE OF ILLINOIS, CITY OF OTTAWA.

City of Ottawa ten per cent. bond.

The City of Ottawa acknowledges itself indebted and promises to pay to W. H. W. Cushman, or to the bearer hereof, the sum of five hundred dollars, lawful money of the United States of America, at the St. Nicholas National Bank of the city of New York, five years from date, with interest at the rate of ten per cent. per annum until paid, payable annually at said bank on presentation of the several coupons hereto annexed, as they shall severally become due, and to the payment of the principal and of the several coupons hereto annexed, and of the interest as aforesaid, after maturity, the faith of the city is irrevocably pledged.

11

[25 ct. rev. st.]

This is one of one hundred and twenty bond' of like amount, and even date herewith, numbered one to one hundred and twenty respectively, issued by the City of Ottawa, by virtue of the charter of said city, wherein it is provided that "The city council shall have power to borrow money on the credit of the city, and to issue bonds therefor and pledge the revenue of the city for the payment thereof. Provided that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum."

ART. V, SEC. 3. "No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city, attending an election for that purpose."

ART. X, SEC. 20. And, also, in accordance with a certain ordinance passed by the city council of said city, on the 15th day of June, A. D. 1869, entitled "An ordinance to provide for a loan for municipal purposes," which ordinance was ratified by a majority of all the qualified voters of said city at an election holden on the 20th day of July, A. D. 1869, and in conformity with an ordinance passed by the city council of said city on the 30th day of July, 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes.'"

12

Witness the signatures of the mayor and clerk of said city and the corporate seal thereof, this 2d day of August, in the year of our Lord one thousand eight hundred and sixty nine.

[SEAL OF CITY.] HENRY A. SHULER, *Mayor.*
R. N. WATERMAN, *Clerk.*

"EXHIBIT B."

No. 5.] *City of Ottawa interest warrant.* [$50.

The City of Ottawa promises to pay bearer, 2d August, A. D. 1873, fifty dollars at St. Nicholas National Bank, New York City, being one year's interest on bond numbered as above. 4.

HENRY A. SHULER, *Mayor.*
R. N. WATERMAN, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of Illinois,
State of Illinois, La Salle County, ss:

Lester H. Eames, being dvly sworn, says that he negotiated the sale to the plaintiff of the bonds & coupons alleged in the foregoing
13 declaration to belong to the plaintiff therein, that in so doing he acted as the agent of Miss M. Louise Eames, the daughter of Maria Eames, and for himself personally. That said bonds and coupons were originally purchased before any of them became due, bona fide, with no notice or intimation of any defense thereto, but with the assurance and belief that the same were valid, and for a valuable consideration actually paid by this affiant and the said Mrs. Maria Eames & Maria Louise Eames, but in severalty & not jointly.

That the action is founded upon the said bonds and interest coupons in the annexed declaration, specifically mentioned, viz, bonds Nos. 5 to 40, inclusive, and upon the 2 interest coupons annexed to each of said bonds, and also upon bonds Nos. 61 & 63 & bonds No. 65 to 80, inclusive, and upon the 7 interest coupons annexed to each of said bonds last mentioned, and upon 7 interest coupons annexed to each of said bonds Nos. 81 to 120, inclusive, as in said declaration alleged; that the whole amo'nt of said bonds and coupons so belonging to said plaintiff are due and unpaid, with ten per cent. interest on said bonds from the time they severally became due; and the said coupons, with 7 per cent. interest from the time they severally became due, being payable in New York; that there are no credits, deductions, or set-offs against the same, or any part thereof whatever; that this affidavit is made at the
14 request of G. S. Eldridge, the plaintiff's attorney, the said plaintiff being a resident of the State of Missouri.

LESTER H. EAMES.

Subscribed and sworn to before me this 10th day of February, A. D. 1880.

[NOTARIAL SEAL.] H. T. GILBERT,
Notary Public.

(Endorsed:) Filed Febr'y 11th, 1880. Wm. H. Bradley, clerk.

Afterwards, to wit, on the second day of March, in the adjourned March term, A. D. 1880, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, circuit judge, appears the following entry, to wit:

WILLIAM H. CARY
vs. } Debt.
CITY OF OTTAWA.

On application of the counsel for the defendant, and by agreement, the time for the defendant to plead herein is extended one week.

Afterwards, to wit, on the eleventh day of March, in said adjourned March term, A. D. 1880, of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett,
15 district judge, appears the following entry, to wit:

WILLIAM H. CARY
vs.
THE CITY OF OTTAWA. } Debt.

Now come the parties, by their attorneys, and by agreement, it is ordered that the defendant have leave to file pleas herein by the twentieth instant, and that this cause be submitted to the court for trial and a jury waived.

Afterwards, to wit, on the twenty-second day of March, A. D. 1880, came the defendant, by Messrs. Lawrence, Campbell & Lawrence, its attorneys, and filed in said clerk's office, in said entitled cause, their pleas, and also an affidavit of merits; which said pleas and said affidavit are respectively in the words and figures following, to wit:

16 *Pleas.*

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the circuit court of the United States in and for the district aforesaid, and March term thereof, A. D. 1880.

WILLIAM H. CAREY
vs.
THE CITY OF OTTAWA, IN THE COUNTY OF LA SALLE AND STATE OF ILLINOIS. } Action of debt.

And the said defendant, by Samuel Richolson, M. T. Maloney, and George C. Campbell, its attorneys, comes and defends the wrong and injury, when, etc., and says that the said supposed bonds and coupons mentioned and described in the plaintiff's declaration as bonds of the City of Ottawa, bearing date on the second day of August, A. D. 1869, and numbered 5 to 40, both inclusive, and bonds numbered 61 to 63, both inclusive, and bonds numbered 65 to 80, both inclusive, and the coupons attached thereto are not deeds, bonds, or writings obligatory of the said City of Ottawa, defendant, and were not executed and delivered by said City of Ottawa, and of this the defendant puts itself upon the country, &c.

17 By SAMUEL RICHOLSON,
M. T. MALONEY, AND
GEORGE C. CAMPBELL,
Its Attorneys.

STATE OF ILLINOIS,
La Salle County:

Maurice T. Maloney, being first duly sworn, upon his oath deposes and says that he is an officer of the City of Ottawa; that is to say, the city attorney of the said City of Ottawa, duly elected and qualified as such officer. Affiant further states upon his said oath that he verily believes the facts set forth in the above and foregoing plea are true in substance and in fact.

M. T. MOLONEY.

Subscribed & sworn to before me this 19th day of March, A. D. 1881.
[SEAL.] D. B. SNOW,
Notary Public.

1. And for a further plea in this behalf the said defendant says, actio non, because it says that the said bonds and coupons in said declaration described were sold and delivered to the plaintiff long after the same, by their terms, respectively, were due and payable, to wit, on the first day of September, A. D. 1879.

And defendant further avers that the said bonds and coupons in said declaration mentioned and described, were executed by the said mayor and city clerk of said defendant municipality, and delivered in
18 the manner set forth and described in plaintiff's declaration, by virtue of the supposed power and authority given by a certain ordinance of the City of Ottawa, passed by the city council of said City of Ottawa on the 15th day of June, A. D. 1869, and referred to by its title in the body of each of said bonds, entitled "An ordinance to provide for a loan for municipal purposes," and was in the words and figures following, to wit:

Be it ordained by the city council of the City of Ottawa:

SECTION I. That the mayor of the city be, and he is hereby, authorized to borrow in the name of the city, at a rate of interest not exceeding ten per cent., the sum of $60,000 for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor in sums of five hundred dollars, with interest payable annually, said bonds to be payable one-third in five years, one-third in ten years, and one-third in fifteen years after the date thereof.

Provided, That no application shall be made of the proceeds of said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured by the city.

SECTION II. Be it also ordained that a sufficient sum to pay the interest on said loan shall be annually provided by taxation and
19 set apart as a separate fund, and to be applied to the payment of the interest on said bonds and for no other purpose.

SECTION III. This ordinance shall be submitted to the votes of the city, to be voted for or against, at an election to be held for that purpose on the 20th day of July, 1869; the manner of the determination shall be by depositing ballots, upon which shall be written or printed "For the loan ordinance," or "Against the loan ordinance."

And also an ordinance passed by the city council of the City of Ottawa, on the 30th day of July, A. D. 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which was in the words and figures following, to wit:

Whereas by an ordinance passed by the city council on the 15th day of June, 1869, it was provided that the mayor of the city should be authorized to borrow in the name of the city sixty thousand dollars, to be expended in developing the natural advantages of the city for manufacturing purposes, and to issue the bonds of the city therefor; and

Whereas it was provided by said ordinance that the same should be submitted to the voters of the city, to be voted for or against

at an election to be holden for that purpose on the 20th day of July, 1869, and whereas at said election the said ordinance was ratified by the voters of the city by a majority of 823 votes, being a majority of the legal voters of the city:

Now, therefore, be it ordained by the city council of the City of
20 Ottawa that the bonds of the city for the sum of sixty thousand dollars be issued by the mayor in accordance with the terms and conditions of said ordinance of June 15th, 1869, and that he deliver the same to William H. W. Cushman, to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the same in the improvement of the water-power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof under the franchises and powers which have been granted for that purpose by the legislature of the State, or which may hereafter be granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity; provided that said Cushman shall execute and deliver to the mayor an agreement from him to the City of Ottawa that he will, without unreasonable or unnecessary delay, cause a good, substantial, and sufficient dam to be constructed across the Illinois River above the city, to bring into use all the available water-power of said river at Ottawa, and will construct sufficient head and tail races to make such water-power available; said races to be constructed and continued to the Fox River below the aqueduct and above the island in Fox River, as fast as the same may be required for actual use and as fast as said water-power can be leased at fair and reasonable rates and be brought into actual operation,

and that he will also erect a good, substantial, and sufficient dam
21 across Fox River, so as to make available the water-power of both rivers at Ottawa, as soon as the additional water-power created by such dam across Fox River can be brought into actual use by being leased at reasonable and fair rates, so as to have all the available water-power of both rivers at Ottawa ready for use as rapidly as called for; and provided also, that said Cushman shall bind himself that if said work is not constructed as aforesaid that he will return said bonds to the city, or the value of the same, and save it harmless from all loss on account of the same, or on account of interest accruing thereon; and in case said work shall not be completed by said Cushman, then to return a pro rata share of said bonds in the proportion that the cost of the work constructed shall bear to the part of the work not constructed; provided, that at least one of the dams above mentioned, with the races necessary to make the water-power thereby created available for practical use shall be completed, or the whole of said bonds shall be returned to the city by said Cushman.

The intent of this ordinance being to secure the improvement and development of said water-power in the city by appropriating the loan obtained under the ordinance aforesaid for that purpose, or pro rata, as far as said water-power shall be made available for practical use. And also the charter of said City of Ottawa, defendant, wherein it is provided (article V, sec. III), the city council shall have power to

require of all officers appointed in pursuance of this charter
22 bonds, with penalty and security for the faithful performance of their respective duties as may be deemed expedient; and also to require all officers appointed as aforesaid to take an oath for the faithful performance of the duties of their respective offices before entering upon the discharge of the same; to establish, support, and

regulate common schools; to divide the city into school districts; to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof; provided, that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum.

No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose (article X, section XX).

And the said bonds and coupons, in plaintiff's declaration described, were executed by no other power or authority whatever.

And defendant further avers that the 18th general assembly of the State of Illinois, convened in January, A. D. 1851, passed an act, made and declared by the said general assembly to be a public act, approved February the 15th, 1851, entitled "An act to authorize certain persons to construct a dam across Fox River for hydraulic and manufacturing purposes."

By said act it was provided that said William H. W. Cushman and other persons named in the first section thereof, and their associates and successors were created a body-politic and corporation under
23 the name and style of "The Ottawa Manufacturing Company," and the substantial rights, privileges, and powers granted thereby to said corporate company were set forth in the second section of said act, as follows:

"§ II. The said company, when formed, are hereby authorized to build a dam across Fox River, on section eleven (11) or twelve (12), in township thirty-three (33) north, of range three (3) east, in La Salle County, for the purpose of creating a water-power, and the said company may use, lease, or otherwise dispose of the same, and may construct such other works, buildings, and machinery as may be deemed necessary or proper to use such water, and to promote the interests and objects of the company."

Further, the defendant avers that the 24th general assembly of the State of Illinois, convened January the 2nd, A. D. 1865, passed an act, approved February 16th, 1865, to amend an act, entitled "An act to amend an act entitled 'An act to authorize certain persons to construct a dam across Fox River for hydraulic and manufacturing purposes, approved February 15, 1851,'" which act is in the words and figures following, to wit:

SECTION I. Be it enacted by the people of the State of Illinois, represented in the general assembly, that the said company shall have, in addition to the powers granted in and by the said act to which this is an amendment, the right for all of the purposes mentioned in the said act to build a dam across the Illinois River, at such point as the said company may elect, and also the right to construct a race or
24 races for the purpose of introducing the water of the Illinois River into the pool of the dam authorized to be erected across Fox River, and for any or all purposes contemplated by this act, and by the act to which this is an amendment, may take and use such portion of any highway, street, alley, or public ground as may be deemed necessary.

§II. Section nine (9) of the act to which this is an amendment is hereby amended by adding at the end of the same the following:

"Provided that no action or other proceeding shall be had against

said company on account of the erection of said dams, race or races, unless within one year after the erection or construction of the same or any or either of them."

§III. The 4th section of said act to which this is an amendment shall read as follows:

"The capital stock of said company may be fixed by the same and divided into shares, and may be increased or diminished."

§IV. The name of "Henry G. Cotton" in the first section of the said original act is stricken out, and the names of "Dwight Cameron" and "John F. Nash" are hereby inserted in its stead. Approved February 16, 1865.

And defendant further avers that the said act so incorporating the said Ottawa Manufacturing Company, and the said act amendatory thereto, were the same franchises and powers referred to in the said ordinance passed July 30th, A. D. 1869, as having been granted for that purpose by the legislature of the State of Illinois, and under
25 which said William H. W. Cushman was authorized and directed to expend the proceeds of the said one hundred and twenty bonds, of which the said bonds and the coupons attached thereto, mentioned and described in plaintiff's declaration, are a part.

Defendant further avers that the said Ottawa Manufacturing Company was then and there, and now is, a private corporation, organized for private business ends only, and was in no way connected with or controlled by the said defendant and was at no time connected with or controlled by the municipal organization or government of defendant; and that the said bonds and coupons described in plaintiff's declaration were issued to the said Ottawa Manufacturing Company and the said William H. W. Cushman, and to the bearer thereof, by the city council of defendant as a mere voluntary donation to the said Ottawa Manufacturing Company in the prosecution of a strictly private business enterprise, to wit, the business mentioned in the aforesaid ordinances passed by the city council as aforesaid on the 30th day of July, A. D. 1869, and the said bonds and coupons were not issued for any municipal purpose whatever. All of which matters hereinbefore set forth the said Cushman and the said Ottawa Manufacturing Company then and there had full actual notice; and the said plaintiff procured the said bonds and coupons in his said declaration described to be sold and delivered to him after the maturity thereof, and with full notice of all the rights and defenses above set forth.

26 And so the defendant says that the said action of the said city council of the City of Ottawa, defendant, in issuing the said bonds and coupons, and the action of the said mayor and clerk of defendant in executing the same, was wholly without any authority of law, and the same are null and void, a .d this defendant will verify. Wherefore it prays judgment, &c.

2. And for a further plea in this behalf, defendant says actio non, because it says that the said bonds and coupons in plaintiff's declaration mentioned and described, were executed by the said mayor and city clerk of the said City of Ottawa under the supposed power and authority of a certain ordinance of the City of Ottawa, passed by the city council thereof on the 15th day of June, 1869, and referred to by its title in the body of each of said bonds, and which said ordinance was falsely entitled "An ordinance to provide for a loan for municipal purposes," and which falsehood is plainly apparent upon reading said ordinance, which, after the false name and title thereof, is in the words and figures following, to wit:

Be it ordained by the city council of the City of Ottawa—

SECTION I. That the mayor of the city be, and he is hereby, authorized to borrow, in the name of the city, at a rate of interest not exceeding ten per cent., the sum of $60,000 for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor in
27 sums of five hundred dollars, with interest, payable annually, said bonds to be payable one-third in five years, one-third in ten years, and one-third in fifteen years after the date thereof.

Provided, that no application shall be made of the proceeds of said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid, shall be fully secured by the city.

SECTION II. Be it also ordained, that a sufficient sum to pay the interest on said loan shall be annually provided by taxation, and set apart as a separate fund, and to be applied to the payment of the interest on said bonds, and for no other purpose.

SECTION III. This ordinance shall be submitted to the votes of the city, to be voted for or against at an election to be held for that purpose on the 20th day of July, 1869; the manner of the determination shall be by depositing ballots, upon which shall be written or printed, "For the loan ordinance," or "Against the loan ordinance."

And also under the supposed power of another ordinance of said City of Ottawa, passed by the city council thereof on the 30th day of July, A. D. 1869, which said ordinance was entitled, "An ordinance to carry into effect the ordinance of June 15th, 1869," falsely entitled "An ordinance to provide for a loan for municipal purposes," which said last ordinance is in the words and figures following, to wit:

28 "Whereas by an ordinance passed by the city council on the 15th day of June, 1869, it was provided that the mayor of the city should be authorized to borrow in the name of the city sixty thousand dollars, to be expended in developing the natural advantages of the city for manufacturing purposes, and to issue the bonds of the city therefor, and whereas it was provided by said ordinance that the same should be submitted to the voters of the city to be voted for or against, at an election to be holden for that purpose on the 20th day of July, 1869; and whereas at said election the said ordinance was ratified by the voters of the city by a majority of 823 votes, being a majority of the legal voters of the city." And the said bonds and coupons in plaintiff's declaration described, were executed by no other power or authority whatever.

And the defendant further avers that the franchises and powers referred to in the said ordinances above-mentioned as having been granted for the purposes set forth in the said ordinances, are the same franchises and powers which (by the act of the 17th general assembly of the State of Illinois, entitled "An act to authorize certain persons to construct a dam across Fox River, for hydraulic and manufacturing purposes, approved February 15, 1851," and an act of the 24th general assembly of the State of Illinois, amendatory thereto, approved February 16, 1865, entitled "An act to authorize certain persons to
29 construct a dam across Fox River, for hydraulic and manufacturing purposes," approved February 15, 1851) were conferred upon a corporation thereby created and incorporated as the Ottawa Manufacturing Company.

And the defendant further avers that the said Ottawa Manufacturing Company was then and there, and now is, a private corporation, organized for private business ends only, and was in no way connected with, or controlled by, the said defendant, and that said bonds and coupons described in plaintiff's declaration were issued to the said William H. W. Cushman for the use and benefit of the said Ottawa Manufacturing Company (the said Cushman being then and there the president thereof), by the said mayor and city clerk of said City of Ottawa, as a mere voluntary donation to the said Ottawa Manufacturing Company in the prosecution of a strictly private business enterprise situated outside of the city limits of defendant, to wit, the business mentioned in the aforesaid ordinance of the 30th of July, 1869, and the said bonds and coupons were not issued for any municipal purpose whatever.

And the defendant further avers that the statement in the title of said ordinance of June 15, 1869, that the loan to be voted for or against by the legal voters of said City of Ottawa, defendant, for municipal purposes, was false and untrue, and that the said ordinance itself was never submitted to the voters of said city to be voted for or against with knowledge of the contents of the said ordinance, and that the only notice of said election given to said voters was by posting notices stating the time and place of such election, and
30 stating the object of such election to be to vote for or against a loan for municipal purposes, and that the said ordinance was not (except the title thereof) submitted to the legal voters of said City of Ottawa, to be voted for or against, at an election held for that purpose, by means whereof the said voters of the City of Ottawa were induced to vote for an ordinance for a loan for a private and not for a municipal purpose, under the false pretense that the intended loan was for a municipal purpose solely, all of which matters and defenses herein set forth, the said Cushman and the said Ottawa Manufacturing Company then and there had full, actual notice, and the said plaintiff procured the said bonds and coupons in the said declaration described, to be sold and delivered to him after the maturity thereof, and with full notice of the rights and defences above set forth, and so the defendant says that said ordinance was never lawfully submitted to and adopted by a vote of the legal voters of said City of Ottawa, and was null and void, and the said action of said mayor and clerk of said city in the execution of said bonds and coupons was wholly without any authority of law and this the defendant will verify. Wherefore it prays judgment, &c.

3. And for a further plea herein, defendant says actio non, because it says that the said bonds and coupons were issued by the mayor and clerk of said City of Ottawa, to the said William H. W. Cush-
31 man (in the manner set forth in plaintiff's declaration on to wit, the 2d day of August, A. D. 1869), for the use and benefit of the Ottawa Manufacturing Company, a private corporation (organized for strictly private ends only, and in no way connected with or controlled by defendant) created by an act of the general assembly of the State of Illinois, approved February 15th, 1851, entitled "An act to authorize certain persons to construct a dam across Fox River, for hydraulic and manufacturing purposes," and an act of the 24th general assembly of the State of Illinois, amendatory to the above act, approved February 16th, 1865, entitled "An act to authorize certain persons to construct a dam across Fox River, for hydraulic and manufacturing purposes," approved February 15, 1851, the first above-named act creating the powers, purposes and franchises of the Ottawa Manufacturing Company,

was declared, and enacted by the said general assembly to be a public act, and the said bonds and coupons were issued by the city council of defendant municipality to the said William H. W. Cushman, for the use and benefit of the Ottawa Manufacturing Company, in its said private capacity as a mere donation to aid the said Ottawa Manufacturing Company in the prosecution of a strictly private business enterprise, and not for any municipal purpose whatever.

And defendant now here avers that the city council of the City of Ottawa, at or prior to the time the said bonds and coupons were issued did not pass any ordinance providing for borrowing any sum or
32 sums of money whatever, nor to issue bonds of the said City of Ottawa, to be delivered to said William H. W. Cushman or any other person or persons whatever, to be issued or expended in aid of the said Ottawa Manufacturing Company as aforesaid, in any manner whatever in the prosecution of its business under the powers and franchises granted by the acts of the general assemblies aforesaid incorporating the same.

And further avers that the said city council at or prior to the time the said bonds and coupons described in plaintiff's declaration were issued as therein alleged, or at any time did not submit any ordinance to the voters of the said City of Ottawa to be voted for or against, by the voters of said City of Ottawa, attending any election held for that purpose, nor was any election ever held in said City of Ottawa for the purpose of submitting to the voters thereof any ordinance providing for borrowing money in the sum of $60,000 or any sum or sums whatever, and to issue bonds of defendant therefor, delivered to said Cushman and to be used to aid the said Ottawa Manufacturing Company in prosecuting the powers and franchises granted it by the said acts of the said general assemblies of the State of Illinois, nor was any ordinance or proposition whatever (to borrow the sum of sixty thousand dollars or any other sum whatever, and to issue said one hundred and twenty bonds in plaintiff's declaration described therefor, to the said Ottawa Manufacturing Company the said William H. W. Cushman, or
33 any other person or persons whomsoever), to aid the said Ottawa Manufacturing Company in prosecuting its business under the powers and franchises aforesaid, submitted to the voters of said city or voted for by a majority of the voters of said City of Ottawa attending any election held for that purpose.

And so defendant says that the issuing of said bonds in plaintiff's declaration described by the city council of Ottawa, aforesaid, was wholly unauthorized and in violation of the provisions of the charter of the said City of Ottawa in that behalf, all of which said plaintiff had notice when he purchased said bonds and coupons as alleged in said declaration, and this defendant is ready to verify; wherefore it prays judgment, &c.

4. And for a further plea in this behalf defendant says, actio non, because it says, as it has already in said first plea said, that the said bonds and coupons mentioned and described in plaintiff's declaration were executed by the mayor and city clerk of the said City of Ottawa, and delivered to the said William H. W. Cushman, as set forth in said declaration, on the second day of August, A. D. 1869, for the use and benefit of the Ottawa Manufacturing Company, aprivate corporation (organized for strictly private ends, only and in no way connected with or controlled by the defendant) created by an act of the 17th general assembly of the State of Illinois, approved February the 15th, A. D. 1851, entitled, "An act to authorize certain persons to construct

34 a dam across the Fox River for hydraulic and manufacturing purposes," and also an act of the 24th general assembly of the State of Illinois, amendatory to the above act, approved February the 16th, A. D. 1865, entitled, "An act to amend an act to authorize certain persons to construct a dam across the Fox River for hydraulic and manufacturing purposes, approved February 15, A. D. 1851," (the first above-named act creating the powers, purposes, and franchises of the Ottawa Manufacturing Company was declared and enacted by the said general assembly to be a public act), and the said bonds and coupons were executed and delivered by the said mayor and city clerk of the defendant municipality to the said Ottawa Manufacturing Company in its said private capacity, as a mere donation to aid the said Ottawa Manufacturing Company in the prosecution of a strictly private business enterprise and not for any municipal purpose whatever.

And the defendant now here avers that at and prior to the time of the execution and delivery, by the said mayor and city clerk, of the said bonds and coupons, to wit, on the second day of August, A. D. 1869, no ordinance of the said City of Ottawa has ever been passed or enacted by the city council thereof providing for the borrowing of any money or providing for the issuance of any bonds of the City of Ottawa therefor.

And the defendant further avers that at and prior to the time of the issuance of the said bonds and coupons no ordinance, passed
35 or adopted by the city council of said City of Ottawa for the purposes aforesaid, had ever been submitted to and voted upon by the voters of said city of Ottawa, at any election held for that purpose, and no such election had ever been called by the city council of the said City of Ottawa, nor held in said city, and no ordinance passed or adopted by the city council of the said City of Ottawa, for the purposes aforesaid, had ever been voted for by a majority of the voters of said City of Ottawa, or by any voters whatever, attending any election held for that purpose.

And the defendant further avers that at and prior to the time of the execution of the said bonds and coupons by the then mayor and city clerk of the said City of Ottawa, to wit, on the second day of August, A. D. 1869, no ordinance had ever been passed or adopted by the city council of the said City of Ottawa, authorizing the said mayor and city clerk to issue any bonds of the said City of Ottawa to the said William H. W. Cushman, or to any other person or persons whomsoever, and so the defendant says that the said bonds and coupons, in plaintiff's declaration mentioned, were executed and delivered to the said William H. W. Cushman and the bearers thereof without any authority whatever from the city council of the City of Ottawa, and from the legal voters of said City of Ottawa, or a majority thereof, obtained and expressed in the manner provided by the charter of said City of
36 Ottawa, all of which said plaintiff had full notice at the time he purchased said bonds and coupons in plaintiff's declaration mentioned, all of which the defendant will verify; wherefore it prays judgment, &c.

5. And for a further plea in this behalf the defendant says actio non, because it says that the said bonds and coupons, in the said declaration mentioned and described, were executed and delivered by the said mayor and city clerk of said defendant, and delivered in the manner set forth and described in said plaintiff's declaration, by virtue only of the supposed power and authority given to the said city council of the said City of Ottawa, by the charter of the said City of Ottawa, wherein

it is provided (article V, section I): "The city council shall have power and authority to levy and collect taxes upon all property, real and personal, within the limits of the city, not exceeding one-half of one per cent. per annum upon the assessed value thereof, and may enforce payment of the same in any manner to be prescribed by ordinance, not repugnant to the Constitution of the United States and of this State." (Article V, sec. III.) "The city council shall have power to require of all officers appointed in pursuance of this charter bonds, with penalty and security for the faithful performance of their respective duties, as may be deemed expedient; and also to require all officers appointed as aforesaid to take an oath for the faithful performance of the
37 duties of their respective offices before entering upon the discharge of the same; to establish, support, and regulate common schools; to divide the city into school districts; to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof; provided that no sum or sums of money shall be borrowed at a greater interest than at ten per cent. per annum." (Article X, sec. XX.) "No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose," and also by virtue of the supposed authority given by an act of the twenty-fifth general assembly of the State of Illinois, entitled "An act to authorize the City of Ottawa to subscribe to the stock of the Ottawa Manufacturing Company, approved February 19th, A. D. 1867," which act provides substantially as follows:

That William Reddick, Milton H. Swift, Jeremiah Wood, George Avery, and Richard Thorne, be, and they are hereby, constituted a board of commissioners for and on behalf of said city, to subscribe to the capital stock of the Ottawa Manufacturing Company the sum of one hundred thousand dollars, and when fully paid to receive and hold the stock of said company for the same, and the proceeds thereof, for and on behalf of said city, and by no other authority whatever.

38 SECTION II. In order to raise the money to enable said commissioners to make such subscription, they are hereby authorized, for and on behalf of said city, to make, execute, and dispose of bonds of the same to the amount of one hundred thousand dollars, at a ratio of interest not exceeding ten per centum per annum, payable in not less than ten years, irrevocably pledging the faith and resources of said city for the ultimate redemption of the same, and the payment of the interest thereon. Such bonds shall not be disposed of by said commissioners for less than their par value.

SECTION III. The city council of said city is hereby authorized and required annually, after being notified by said commissioners of the issuance of such bonds, to levy and collect as other taxes are levied and collected, and at the same time, and in the same manner, not less than six mills on each dollar of the assessed value of the real and personal property in said city. The proceeds of such tax shall be paid over by the collector of said city to the treasurer thereof, and by him kept as a separate fund, subject to the order of said commissioners, for the payment of the interest on said bonds, and in case of a surplus the said commissioners shall invest the same in the bonds of the United States or of the State of Illinois, for the ultimate redemption of such bonds.

SECTION IV. The said commissioners may appoint a president and a secretary, who shall be treasurer. The latter shall give bonds
39 to said city, conditioned for the faithful discharge of his duties,

and they may also appoint a proxy to vote on said stock at any meeting of the stockholders of said company, and instruct such proxy in what way to vote, but no vote shall be given on said stock for either of such commissioners for directors of said company.

SECTION V. Said commissioners may at any time dispose of such stock at not less than its par value, and any holder of any such bonds may at any time exchange the same for an equal amount of said stock. In case of a sale of such stock, or of any portion of the same, the said commissioners shall, if practicable, take up said bonds, and if not shall invest the proceeds in bonds of the United States or of the State of Illinois. Said commissioners shall keep a record of their proceedings and annually report to the city council their doings therein. Said commissioners shall be allowed all reasonable expenses, but no compensation for their services. In case of a vacancy in said board by death, resignation, refusal or neglect to act, or removal from the county of La Salle, the circuit court shall fill such vacancy.

And the defendant avers that the aggregate value of all the property, real and personal, within the limits of the said City of Ottawa, as fixed and ascertained by the assessment thereof, and the return of the
40 said board of equalization of the State of Illinois for and during the year A. D. 1869, was the sum of two millions of dollars; and that since the year A. D. 1869 the value of all the property, real and personal, within the said City of Ottawa, ascertained as aforesaid, has at no time exceeded the sum of two millions and two hundred thousand dollars; and that the actual necessary current expenses of defendant for each year since the year 1869 has been the sum of, to wit, twenty thousand dollars; and that the said tax of one-half of one per cent. of said valuation of the taxable property of said city, together with all revenues derived by said City of Ottawa from licenses and all other sources, have not been more than barely sufficient to meet the yearly actual necessary current expenses of said city each year.

And the defendant further avers that at and prior to the time of the execution and delivery of the said bonds and coupons by the said mayor and city clerk of said City of Ottawa no ordinance had ever been passed or adopted by the city council of the City of Ottawa authorizing the issuance of said bonds and coupons to the said William H. W. Cushman, or any other person or persons whomsoever, and no such ordinance, passed for the purpose aforesaid, had ever been submitted to the voters of said city at any election held for that purpose, and no such ordinance had ever been voted for by a majority of the voters of said City of Ottawa attending any election held for that purpose, nor
41 voted for by any voters of said city whatever; and no election for the purposes aforesaid had ever been held at and within the said City of Ottawa, and no ordinance authorizing the said mayor and city clerk to execute and issue said bonds and coupons in plaintiff's declaration mentioned had ever been passed or adopted.

And the defendant further avers that neither at nor prior to the time of the issuance of the said bonds and coupons in plaintiff's declaration mentioned had the said William Reddick, Milton H. Swift, Jeremiah Wood, George Avery, and Richard Thorne, for and on behalf of the said City of Ottawa, ever subscribed to the capital stock of the said Ottawa Manufacturing Company the sum of one hundred thousand dollars, nor any other sum whatever; nor had they received any stock of the said company for and on behalf of the said City of Ottawa; nor had the above-named persons, as commissioners of the said City of Ottawa, is-

sued any bonds or incurred any indebtedness for and on behalf of the said City of Ottawa in any sum or sums whatever; nor had the city council of the said City of Ottawa ever been notified by the said commissioners of the issuance of any bonds, or to levy or collect any taxes on account of any such bonds for and on behalf of the said City of Ottawa.

And defendant further avers that the said bonds and coupons in plaintiff's declaration mentioned were executed by the said mayor and city clerk of defendant, and delivered to the said William H. W. Cushman for the benefit of the said Ottawa Manufacturing Company, and for no other purpose whatever.

42 And defendant further avers that the said Ottawa Manufacturing Company was then and there, and now is, a private corporation, organized for private business ends only, and was in no way connected with, or controlled by, the said defendant; and that the said bonds and coupons described in plaintiff's declaration were issued and delivered to the said William H. W. Cushman and the said Ottawa Manufacturing Company as a mere voluntary donation to the said Ottawa Manufacturing Company, in the prosecution of a strictly private business enterprise, for the purpose of aiding the said Ottawa Manufacturing Company, in establishing outside of the limits of said City of Ottawa, a water-power for hydraulic and manufacturing purposes; and the said bonds and coupons were not issued for any municipal purpose whatever; and so the defendant says that the said bonds and coupons in plaintiff's declaration mentioned were issued without any authority of law, all of which the plaintiff at the time he purchased the said bonds and coupons had full notice; without this, that the defendant made, executed, or delivered the said several bonds and coupons in said declaration mentioned, or any one of them, or became indebted by reason of the supposed making of said bonds or coupons, or any one of them; and of this defendant puts itself upon the country.

6. And for another and further plea, said defendant says, actio non, because it says that the said Shuler, as mayor, and said Waterman, as clerk, executed, issued, and delivered said bonds and coupons

43 in the declaration mentioned, without any authority whatever; that there was no such authority, because no ordinance of the City of Ottawa therefor was ever adopted by the city council of said city, nor was any ordinance therefor ever submitted to the voters of said city, nor was any such ordinance ever voted for by a majority of the voters of said city attending an election to vote for or against any such ordinance as is provided in and by the city charter must be done to make said bonds valid, and so defendant says that said execution and delivery of said bonds were made by said Shuler and said Waterman as individuals merely, and without the authority of the city council, or of the voters of the said city, and that said bonds and coupons are wholly void and of no effect, all of which defendant will verify.

Wherefore it prays judgment.

7. And for a further plea in this behalf, the said defendant says, actio non, &c., because it says that the said supposed bonds and coupons in the plantiff's declaration described were executed and delivered by the said mayor and city clerk of said defendant, and by no other or different persons; and that under and by virtue of the charter of the said City of Ottawa, defendant herein, the said mayor and city clerk, had not, nor had either of them, any power, authority, or right to execute and deliver said bonds, or any bonds

of the said defendants, unless specially authorized by ordinance of the city council of said City of Ottawa, defendant herein, so to do.

44 And defendant further avers that the only ordinance of said city council which in any way purports to authorize said mayor, or said city clerk, to execute or deliver said bonds or coupons was an ordinance passed by the said city council, on the 30th day of July, A. D. 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, A. D. 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which said ordinance of July 30th, A. D. 1869, was and is in the words and figures following, to wit:

"Whereas, by an ordinance passed by the city council on the 15th day of June, 1869, it was provided that the mayor of the city should be authorized to borrow, in the name of the city, sixty thousand dollars, to be expended in developing the natural advantages of the city for manufacturing purposes, and to issue the bonds of the city therefor; and whereas it is provided by said ordinance that the same shall be submitted to the voters of the city, to be voted for or against, at an election to be holden for that purpose, on the 20th day of July, 1869;

"And whereas, at said election, the said ordinance was ratified by the voters of the city by a majority of 823 voters, being a majority of the legal voters of the city:

"Now, therefore, be it ordained by the city council of the city of Ottawa, that the bonds of the city for the sum of sixty thousand dollars be issued by the mayor, in accordance with the terms and conditions of said ordinances of June 15th, 1869, and that he deliver the same to Will-

45 iam H. W. Cushman, to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the same in the improvement of the water-power upon the Illinois and Fox rivers within the city, and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose by the legislature of the State, or which may be hereafter granted for that purpose, in the manner which in his judgment shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity; provided that said Cushman shall execute and deliver to the mayor from him to the city of Ottawa, that he will, without unreasonable or unnecessary delay, cause a good, substantial, and sufficient dam to be constructed across the Illinois River above the city, to bring into use all the available water-power of said river at Ottawa, and will construct sufficient head and tail races to make such water-power available, said races to be constructed and continued to the Fox River, below the aqueduct, and above the island in Fox River, as fast as the same may be required for actual use, and as far as said water-power can be leased at fair and reasonable rates, and to be brought into actual operation; and that he will also erect a good, substantial, and sufficient dam across the Fox River, so as to make available the water-power of both rivers at

46 Ottawa, as soon as the additional water-power created by such dam across Fox River can be brought into actual use, by being leased at reasonable and fair rates, so as to have all the available water-power of both rivers at Ottawa ready for use as rapidly as called for; and provided, also, that said Cushman shall bind himself that if said work is not constructed as aforesaid that he will return said bonds to the city, of the value of the same, and save it harmless from all loss on account of the same, or on account of interest accruing thereon. And in case said work shall not be completed by said Cushman, then to return a pro rata share of said bonds, in the proportion that the cost of

the work constructed shall bear to the part of the work not constructed; provided that at least one of the dams above mentioned, with the race necessary to make the water-power thereby created available for practical use, shall be completed, or the whole of said bonds shall be returned to the city by said Cushman."

And the defendant avers that in and by said ordinance, so purporting to confer authority on the mayor of said city to execute and deliver said bonds and coupons, it appears that said mayor was directed to execute said bonds and coupons and deliver the same to one William H. W. Cushman, without any consideration whatever, for the purpose of enabling said Cushman to carry on a private enterprise, which was and is an enterprise for other than the municipal or corporate purposes
47 of this defendant; of all which matters and things the defendant avers the said plaintiff had notice at and before the purchase by them of the bonds and coupons in said declaration mentioned.

All of which it is ready to verify. Wherefore, it prays judgment.

8th. And for a further plea in this behalf, the said defendant says actio non, &c., because it says that the said supposed bonds and coupons in the plaintiff's declaration described were executed and delivered by the said mayor and city clerk of said defendant, and by no other or different persons; and that under and by virtue of the charter of the said city of Ottawa, defendant herein, the said mayor and city clerk had not, nor had either of them, any power, authority, or right to execute or deliver said bonds, or any bonds of the said defendant, unless specially authorized by ordinance of the said city council of the said City of Ottawa, defendant herein, so to do.

And defendant further avers that the only ordinance of said city council which in any way purports to authorize said mayor or said city clerk to execute or deliver said bonds or coupons, was an ordinance passed by the said city council on the 30th day of July, A. D. 1869, entitled "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which said ordinance of July 30th, A. D. 1869, was and is in the words and figures set out in the seventh special plea of this defendant, herein pleaded.

48 And the defendant avers that in and by said charter of the said city of Ottawa it was and is provided, among other things, as follows:

"ARTICLE 10, SECTION 20. No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose."

And the defendant avers that the said ordinance of July 30th, A. D. 1869, was never submitted to or voted for by a majority of the voters of said city attending an election held for that purpose, and never was even submitted to said voters to be voted upon at any election whatever.

Of all which the defendant avers said plaintiffs had notice at and prior to the time of the purchase by them of the bonds and coupons in said declaration mentioned.

All of which it is ready to verify. Wherefore it prays judgment.

9th. And for a further plea in this behalf, the said defendant says actio non, &c., because it says that the said supposed bonds and coupons in the plaintiff's declaration described were executed and delivered by the said mayor and city clerk of said defendant, and by no other or different persons, and that under and by virtue of the charter

of the said city of Ottawa, defendant herein, the said mayor and city clerk had not, nor had either of them, any power, authority, or
49 right to execute or deliver said bonds or any bonds of the said defendant, unless specially authorized by ordinance of the city council of said city of Ottawa, defendant herein, so to do.

And defendant avers that the only ordinance of said city council which in any way purports to authorize said mayor or said city clerk to execute or deliver said bonds or coupons was an ordinance passed by the said city council on the 30th day of July, A. D. 1869, entitled 'An ordinance to carry into effect the ordinance of June 15th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which said ordinance of July 30th, 1869, was and is in the words and figures set forth in the seventh special plea of this defendant hereinbefore pleaded.

And the defendant avers that said William H. W. Cushman, in said ordinance mentioned as the person to whom said mayor was authorized to deliver said bonds, was then and there the president of the Ottawa Manufacturing Company, which said company was then and there a private corporation, organized and existing under and by virtue of the laws of the State of Illinois, and then and there engaged as such private corporation in the private business thereof, and that said corporation was not then and there engaged in any public or municipal business of this defendant, the said City of Ottawa; and that under and by virtue of the charter of said city of Ottawa and amendments
50 thereto, the said city had no right or authority by law to issue any bonds to said corporation, or to any one for its use, except under and by virtue of an act of the legislature of the State of Illinois entitled "An act to authorize the city of Ottawa to subscribe to the stock of the Ottawa Manufacturing Company," approved February 19, 1867, which said act was and is in the words and figures following:

An act to authorize the city of Ottawa to subscribe to the stock of the Ottawa Manufacturing Company.

SECTION 1. Be it enacted by the people of the State of Illinois represented in the general assembly, that William Reddick, Milton H. Swift, Jeremiah Wood, George Avery, and Richard Thorn be, and they hereby are, constituted a board of commissioners for and on behalf of said city, to subscribe to the capital stock of the Ottawa Manufacturing Company the sum of one hundred thousand dollars, and when fully paid to receive and hold the stock of said company for the same, and the proceeds thereof for and on behalf of said city.

2. In order to raise the money to enable said commissioners to make such subscription, they are are hereby authorized, for and on behalf of said city, to make, execute, and dispose of bonds of the same to the amount of one hundred thousand dollars, in sums of not less than one thousand dollars, at a rate of interest not exceeding ten per centum per annum, payable in not less than ten years, irrevocably
51 pledging the faith of said city for the ultimate redemption of the same, and the payment of the interest thereon. Such bonds shall not be disposed of by said commissioners for less than their par value.

3. The city council of said city is hereby authorized and required annually, after being notified by said commissioners of the issuance of such bonds, to levy and collect, as other taxes are levied and collected, and at the same time and in the same manner, not less than six mills on each dollar of the assessed value of the real and personal property in said city.

The proceeds of such tax shall be paid over by the collector of said city to the treasurer thereof, and by him kept as a separate fund, subject to the order of said commissioners, for the payment of the interest on said bonds, and in case of a surplus said commissioners shall invest the same in bonds of the United States, or of the State of Illinois, for the ultimate redemption of such bonds.

4. The said commissioners may appoint a president and secretary, who shall be treasurer. The latter shall give bonds to said city, conditioned for the faithful discharge of his duties, and they may also appoint a proxy to vote on said stock at any meeting of the stockholders of said company, and instruct such proxy in what way to vote, but no vote shall be given on said stock for either of such commissioners for directors of said company.

52 5. Said commissioners may at any time dispose of such stock at not less than its par value, and any holder of any such bonds may at any time exchange the same for an equal amount of said stock. In case of a sale of said stock, or of any portion of the same, the said commissioners shall, if practicable, take up said balance, and if not, to invest the proceeds in bonds of the United States, or of the State of Illinois.

Said commissioners shall keep a record of their proceedings and annually report to the city council their doings herein. Said commissioners shall be allowed all reasonable expenses, but no compensation for their services. In case of a vacancy in said board by death, resignation, refusal or neglect to act, or removal from the county of La Salle, the circuit court of said county shall fill such vacancy.

Approved February 19th, 1867.

And the defendant avers that the said act of February 19th, A. D. 1867, was and is an amendment to and limitation of the charter of the said city of Ottawa, which said charter was an act of the legislature of the State of Illinois entitled "An act to charter the city of Ottawa," approved February 10th, 1858, reference to which is hereby made, and that said charter and act were and are the same franchises and powers referred to in said ordinance or said city council passed July 30th, 1869, as having been granted by the legislature of the State of Illinois, under and by which the said city was authorized, by board of commis-

53 sioners appointed by said act, to subscribe to the stock of said Ottawa Manufacturing Company, of which the said William H. W. Cushman was then and there the president, and to issue and deliver to said Ottawa Manufacturing Company its bonds in payment therefor.

And defendant avers that said city of Ottawa was not authorized to issue its bonds to said William H. W. Cushman for the purpose recited in said ordinance, or to said Ottawa Manufacturing Company, except in the manner and under the terms and conditions prescribed by the said act of February 19th, 1867.

And defendant further avers that said act gave no authority to the said city, or the city council thereof, or the mayor or clerk thereof, to execute the said bonds; but, on the contrary thereof, expressly provided and required that said bonds, if issued at all, should be issued by said board of commissioners.

That said board of commissioners were then and there the only corporate authorities who were then and there by law authorized to issue said bonds or coupons, or any of them; of all which the said plaintiffs had notice at and prior to the purchase by them of the bonds and coupons in said declaration mentioned and described.

All of which this defendant is ready to verify. Wherefore he prays judgment.

10th. And for a further plea in this behalf the defendant says actio non, &c., because it says that the said defendant, the City of Ottawa,
54 at the time of the execution and delivery of the supposed bonds and coupons in the said declaration mentioned, was, and from thence hitherto has been, and still is, a municipal corporation of the State of Illinois organized and existing under an act of the legislature of the said State of Illinois entitled "An act to charter the city of Ottawa," approved February 10th, 1853, and that by said charter it was and is, among other things, provided by section 20, article 10, thereof as follows: "No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending an election held for that purpose."

And defendant avers that the only ordinance purporting to authorize the issuance of the bonds and coupons in said declaration mentioned were, and are, as hereinafter set forth.

First. An ordinance passed by the city council of said city on the 15th day of June, A. D. 1860, and referred to by its title in the body of each of said bonds, entitled "An ordinance to provide for municipal purposes," which said ordinance was and is in the words and figures following, to wit:

Be it ordained by the city council of the city of Ottawa,

SECTION 1. That the mayor of the city be, and he is hereby, authorized to borrow, in the name of the city, at a rate of interest not exceeding ten per cent., the sum of $60,000, for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor
55 in sums of five hundred dollars, with interest payable annually; said bonds to be payable one-third in five years; one-third in ten years, and one-third in fifteen years after the date thereof: Provided, that no application shall be made of the proceeds of said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the city council, nor until the faithful application of the proceeds of *of* such bonds for the purposes aforesaid shall be fully secured by the city.

SECTION II. Be it also ordained, that a sufficient sum to pay the interest on said sum shall be annually provided by taxation and set apart as a separate fund, and to be applied to the payment of the interest on said bonds, and to no other purpose.

SECTION III. This ordinance shall be submitted to the vote of the city, to be voted for or against, at an election to be held for that purpose on the 20th day of July, 1869, and the manner of the determination shall be by depositing ballots, upon which shall be written or printed, "For the loan ordinance," or "Against the loan ordinance."

And the defendant avers that the rate of interest provided in said ordinance for the loan contemplated thereby was, and is, the rate of six per cent. per annum, and no more.

And defendant avers that said ordinance was submitted to and voted for by a majority of the legal voters of said city, at an election held for that purpose, on the 20th day of July, A. D. 1869.

And defendant avers that neither the said city charter nor
56 said ordinance gave to said mayor or said city clerk of said city

of Ottawa any authority to execute or deliver said bonds or coupons to any person, but on the contrary thereof, provided that said bonds should be issued by the said city council.

And defendant avers that thereafter and on, to wit, the 30th day of July, A. D. 1869, the said city council passed a further ordinance, entitled "An ordinance to carry into effect the ordinance of June 5th, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,'" which said ordinance was and is in the words and figures set out in the seventh special plea of this defendant herein pleaded.

And the defendant avers that said last-mentioned ordinance never was submitted to the voters of said city of Ottawa, and *and* never was voted for by a majority of the voters of said city at any election whatever.

And the defendant avers that said last-mentioned ordinance was and is the only ordinance which purported to authorize said mayor or said city clerk to execute or deliver the bonds and coupons in said declaration mentioned.

And defendant further avers that said mayor and said city clerk had not, nor had either of them, any authority under and by virtue of said charter of said city of Ottawa, to execute said bonds, or any bonds of said city, unless specially authorized by ordinance of said city council so to do.

And defendant avers that said last-mentioned ordinance pur-
57 ported to authorize the delivery of said bonds to the said William H. W. Cushman therein mentioned, for a purpose other and different from the purpose set forth and stated in said first-mentioned ordinance of June 15th, 1869, and for a purpose for which said city council never had passed any ordinance which had been submitted to the voters of said city, or been voted for by a majority of said voters at any election whatever.

Of all which the said plaintiffs at and prior to the time of the purchase by them of said bonds and coupons in said declaration mentioned had notice.

All of which the defendant is ready to verify; wherefore it prays judgment.

11th. And for a further plea in this behalf the defendant says, actio non, &c., because it says that this defendant is a municipal corporation organized and existing under and by virtue of an act of the legislature of the State of Illinois, entitled "An act to charter the city of Ottawa," approved February 10th, 1853, which said charter is still in force, and with the amendments thereto, still is the charter of this defendant.

And defendant avers, that at the time of the supposed issue of the said bonds and coupons in said declaration mentioned, and it then was and from thence hitherto has been and still is provided by said charter, among other things, as follows: "No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said city attending
58 an election held for that purpose."

And the defendant avers that no ordinance whatever providing for the issue of said bonds and coupons or either of them, was ever submitted to or voted for by a majority of the voters of said city, attending any election, whatever. Of all which matters and things the said plaintiffs, at and prior to the time of the purchase by them of the

said bonds and coupons in said declaration mentioned had notice. All of which it is ready to verify.

Wherefore it prays judgment.

SAM'L NICHOLSON,
M. T. MALONEY, &
LAWRENCE, CAMPBELL & LAWRENCE,
Its Att'ys.

(Endorsed:) Filed March 22, 1880. Wm. H. Bradley, clerk.

Affidavit of merits.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof, March term, 1880.

WILLIAM H. CARY
vs.
CITY OF OTTAWA. } Debt.

STATE OF ILLINOIS,
County of Cook, ss:

Chas. H. Lawrence, being first duly sworn, says that said defendant is a corporation, and that affiant is one of the att'ys therefor, in
59 said cause, & that he verily believes that said defendant has a good defense to said suit, upon the merits, to the whole of plaintiff's demands.

CHAS. H. LAWRENCE.

Subscribed and sworn to before me, this 22d day of November, 1880.

ALONZO H. ROWLEY, *Notary Public.* [SEAL.]

(Endorsed:) Filed March 22, 1880. Wm. H. Bradley, clerk.

Afterwards, to wit, on the eleventh day of May, A. D. 1880, came said plaintiff, by his attorney, and filed in said clerk's office his special demurrer in said entitled cause, which said special demurrer is in the words and figures following, to wit:

Special demurrer.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court in and for said district. March term, A. D. 1880.

WM. H. CARY
vs.
THE CITY OF OTTAWA. }

And now comes the said plaintiff, by G. S. Eldredge, his attorney, and as to the defendant's pleas herein filed, numbered from two (2) to twelve (13) both inclusive, demurs thereto specially, and for sole
60 cause of demurrer thereto says, that the said pleas and each of them severally amount to the general issue, and this he is ready

to verify; wherefore as to each and every of said pleas, said plaintiff prays judgment. &c., as to whether he, said plaintiff, is bound by law to answer any or either of them for the reason aforesaid.

G. S. ELDREDGE, *Pl'ff's Att'y.*

(Endorsed:) Filed May 11, 1880. W. H. Bradley, cl'k.

Afterwards, to wit, on the twenty-third day of February, A. D. 1881, came said parties, by their attorneys, and filed their stipulation in said clerk's office, in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

United States circuit court, northern district Illinois, Dec. term, A. D. 1880.

WM. H. CARY
vs.
THE CITY OF OTTAWA.

It is hereby stipulated that all or any of the matters set forth in the special pleas filed in this cause, so far as they may be held by the court to be competent evidence, may be introduced with the like effect
61 in all respects, as if such several matters had been specially pleaded, and any other matter competent to be introduced in evidence in behalf of the defendants may be introduced under the pleas of nil debet, non est factum, filed herein. And that a trial by jury is hereby waived, and it is agreed that this cause be submitted to the court for trial without a jury.

Dated Jan'y 12, 1880.

G. S. ELDREDGE, *Pl'ff's Att'y.*
LAWRENCE, CAMPBELL & LAWRENCE,
Att'y for Defendant.

(Endorsed:) Filed Feb'y 23, 1881. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the twenty third day of February, A. D. 1881, in the December term, A. D. 1880, of said court, in the record of the proceedings therof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, appears the following entry, to wit:

WILLIAM H. CARY
vs.
THE CITY OF OTTAWA. } Debt.

Now come the parties, by their attorneys, and on motion of the defendant, by its attorneys, and as per stipulation filed, leave is
62 given it to withdraw all its pleas herein, except the plea of non est factum, and the plea nil debet, and any and all matters set forth in said pleas so withdrawn may be admitted, so far as held to be competent evidence; and upon issue joined herein, by agreement of the parties as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court; and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the twenty-fourth day of February, A. D. 1881,

in said December term, A. D. 1880, of said court, before the Hon. Henry W. Blodgett, district judge, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

WILLIAM H. CARY
vs.
THE CITY OF OTTAWA. } Debt.

Now come again the parties, by their attorneys, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

63 Afterwards, to wit, on the twenty-fifth day of February, A. D. 1881, in the December term, A. D. 1880, of said court, in the record of the proceedings thereof before the Hon. Henry W. Blodgett, district judge, appears the following entry in said entitled cause, to wit:

WILLIAM H. CARY
vs.
THE CITY OF OTTAWA. } Debt.

Now come again the parties, by their attorneys, and after hearing the concluding arguments of counsel upon the matters herein, the court takes the same under advisement.

Afterwards, to wit, on the fifteenth day of July, in the July term, A. D. 1881, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, appears the following entry, to wit:

WILLIAM H. CARY
vs.
THE CITY OF OTTAWA. } Debt.

Now come the parties, by their attorneys, and the court having considered, and being now fully advised upon the matters heretofore submitted herein, finds the issue for the plaintiff, and finds his debt
64 in the sum of fifty thousand and nine hundred dollars, and assesses his damages to the sum of twenty-one thousand nine hundred and fourteen dollars and seventy-six cents.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of fifty thousand and nine hundred dollars, his debt, and the said sum of twenty-one thousand nine hundred and fourteen dollars and seventy-six cents, his damages, making the sum of seventy-two thousand eight hundred and fourteen dollars and seventy-six cents for both debt and damages, together with his costs and charges in this behalf expended, amounting to the sum of one hundred and thirty dollars and twenty-five cents.

On the same day, to wit, the fifteenth day of July, A. D. 1881, there was filed in said clerk's office the certificate of special findings by the court in said entitled cause, which were duly signed and made of record therein by the court, and read in the words and figures following, to wit:

65 *Certificate of findings by the court.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof, December term thereof, A. D. 1880.

WILLIAM H. CARY
vs.
THE CITY OF OTTAWA. } Action of debt.

Be it remembered that heretofore, to wit, on the 23d day of February, A. D. 1881, the above-entitled cause came on for trial, and it was then and there agreed by and between the plaintiff and defendant, by an instrument of writing, signed by the respective counsel and filed in said cause, that a jury should be waived, and said cause should be submitted to the court for trial; and the parties having also agreed that any and all defenses to said action which would be admissible under any special plea herein should also be admitted under the general issue; and the court, having heard all the evidence in said cause, doth find the following facts:

First. The City of Ottawa, defendant herein, has been from
66 the 10th day of February, A. D. 1853, a city of the State of Illinois, incorporated under a charter which, among other things, contains the following:

"ARTICLE 5, SEC. 1. The city council shall have power and authority to levy and collect taxes upon all property, real and personal, within the limits of the city, not exceeding one-half of one per cent. per annum upon the assessed value thereof, and may enforce the payment of the same in any manner to be prescribed by ordinance not repugnant to the Constitution of the United States and of this State.

"ARTICLE 5, SEC. 3. The city council shall have power * * * to establish, support, and regulate common schools, to divide the city into school districts, to borrow money on the credit of the city, and to issue bonds therefor, and pledge the name of the city for the payment thereof; provided, that no sum or sums of money shall be borrowed at a greater interest than at 10 per cent. per annum.

"ARTICLE 10, SEC. 20. No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to, and voted for, by a majority of the voters of said city, attending an election held for that purpose."

Second. That said charter has been amended from time to time as follows:

By an act approved March 1st, 1854, entitled "An act to amend the charter of the city of Ottawa, authorizing said city to take stock
67 in a bridge company therein named," and providing that "the corporate authorities of said city may levy a tax therein for the purpose of paying the interest upon any bonds or other securities issued by the city for that purpose; said tax shall be levied as other taxes for said city purposes are or may by law required to be."

Also, by an act entitled "An act to authorize the city of Ottawa to subscribe to the stock of the Ottawa Manufacturing Company," as follows:

Be it enacted by the people of the State of Illinois, represented in the general assembly:

SECTION 1. That William Reddick, Milton H. Swift, Jeremiah Wood, George Avery, and Richard Thorn be, and they are hereby, constituted a board of commissioners, for and on behalf of said city, to subscribe to the capital stock of the Ottawa Manufacturing Company the sum of one hundred thousand dollars, and, when fully paid, to receiver and hold the stock of said company for the same and the proceeds thereof for and on behalf of said city.

SECTION 2. In order to raise the money to enable said commissioners to make such subscriptions, they are hereby authorized, for and on behalf of said city, to make, execute, and dispose of bonds of the same to the am'nt of one hundred thousand dollars, at a rate of interest not exceeding ten per centum per annum, payable in not less than ten years, irrevocably pledging the faith and resources of said city for the ultimate redemption of the same, and for the payment of
68 the interest thereon. Such bonds shall not be disposed of by said commissioners, for less than their par value.

SECTION 3. The city council of said city is hereby authorized and required annually, after being notified by said commissioners of the issuance of such bonds, to levy and collect as other taxes are levied and collected, and at the same time and in the same manner, not less than six mills on each dollar of the assessed value of the real and personal property in said city. The proceeds of such tax to be paid over, by the collector of said city, to the treasurer thereof, and by him kept as a separate fund, subject to the order of said commissioners, for the payment of the interest on said bonds, and in case of a surplus, the said commissioners shall invest the same in bonds of the United States, or of the State of Illinois, for the ultimate redemption of such bonds.

SECTION 4. The said commissioners may appoint a president and a secretary, who shall be treasurer. The latter shall give bonds to said city, conditioned for the faithful discharge of his duties, and they may also appoint a proxy to vote on said stock at any meeting of the stockholders of said company, and instruct such proxy in what manner to vote, but no vote shall be given on said stock for either of such commissioners or directors of said company.

SECTION 5. Said commissioners may, at any time, dispose of
69 such stock at not less than its par value, and any holder of any such bonds *bonds* may, at any time, exchange the same for an equal amount of said stock. In case of a sale of such stock, or of any portion of the same, the said commissioners shall, if practicable, take up said bonds, and if not, shall invest the proceeds in bonds of the United States, or the State of Illinois. Said commissioners shall keep a record of their proceedings, and annually report to the city council their doings herein. Said commissioners shall be allowed all reasonable expenses, but no compensation for their services. In case of a vacancy in said board by death, resignation, refusal or neglect to act, or removal from the county of La Salle, the circuit court of said county shall fill such vacancy.

Approved February 19th, 1867.

Also by an act to amend an act entitled "An act to charter the city of Ottawa," approved February 10, 1853, as follows:

SECTION 1, CHAPTER 2. When the bonds now held against the City of Ottawa shall become due the city council of said city are hereby au-

thorized to cause other bonds for the same sum or sums, and on the same terms, and for such time as the city council may deem proper, to be issued and delivered to the holders of said bonds now held against said city; and the city council are hereby authorized, in addition to the taxes now authorized to be levied and collected by said city, to
70 levy and collect in the same manner and at the same time as other city taxes are levied and collected, a tax not exceeding two mills on each dollar of the assessed value of the real and personal property in said city, said tax when collected to be paid to the city treasurer, and by him to be kept as a separate fund to pay off the bonds so held against said city. Said separate fund may be invested in bonds of the United States or of this State.

Approved March 5th, 1867.

Third. That on or about the 1st day of July, A. D. 1867, the commissioners appointed by the said act of February 19th, A. D. 1867, viz, William Reddick, Milton H. Swift, Jeremiah Wood, George Avery, and Richard Thorne, met and duly organized as such board of commissioners by electing Milton H. Swift president and John F. Nash secretary of said board of commissioners.

That after the organization of said board of commissioners, and prior to the 15th day of June, A. D. 1869, the city council took steps to secure a subscription by the said board of commissioners, to the capital stock of said Ottawa Manufacturing Company, and to secure shares of its stock therefor under said act of February 19th, 1867, but said board of commissioners failed to make such subscription and to procure such stock in that behalf.

Fourth. That on the 15th day of February, 1851, the legislature of the State of Illinois passed an act entitled "An act to authorize
71 certain persons to construct a dam across Fox River for hydraulic and manufacturing purposes," which act was as follows:

Be it enacted by the people of the State of Illinois represented in the general assembly:

SECTION 1. That William H. W. Cushman, George E. Walker, John V. A. Hoes, George H. Norris, Lorenzo Leland, and Henry G. Cotton, or such of them, or such other persons as may choose to associate with them, by subscribing to the stock of the company as hereinafter authorized, are hereby created a body corporate and politic by the name of the "Ottawa Manufacturing Company," and by that name shall have perpetual succession, and be capable of contracting and being contracted with, of sueing and being sued, of acquiring, either by purchase or under the provisions of this act as hereinafter authorized, and of holding real estate and personal property, for the purposes contemplated and authorized by this act, or in discharge of debts due the said corperation, and of using and disposing of the same may have a common seal, which they may alter at pleasure, and may make all needful by-laws for the government of the company, *which* officers, and the management of its affairs, and alter the same at pleasure; may appoint or provide for the election of such officers and agents as may be deemed necessary, and prescribe the duties and liabilities of all the officers of said company.

72 SECTION 2. The said company, when formed, are hereby authorized to build a dam across Fox River, on section 11 (11) or twelve (12), in township thirty-three (33) north, of range 3 (3) east, in La Salle County, for the purpose of creating a water-power, and the said company may use, lease, or otherwise dispose of the same, and

may construct such other works, buildings, and machinery as may be deemed necessary or proper to use such water, and to promote the interests and objects of the company.

SECTION 3. The said company, having first obtained the assent of the corporate authorities of the town of Ottawa, may use any of the streets, alleys, or public grounds in the said town for the purpose of creating such power, or of using or applying the same, as herein provided and authorized.

SECTION 4. The capital stock of said company shall not exceed fifty thousand dollars, which shall be divided into shares of one hundred dollars each.

SECTION 5. The persons named in the first section of this act, or a majority of them, or of the survivors of them, if any shall die, may cause books of subscription to the capital stock of said company to be opened at some public place, after having given notice of the same for at least thirty days by publication in some newspaper printed in said
73 county. Any person may become a stockholder in said company by subscribing at least one share, and paying the same, and all assessments thereon when called for.

Each share shall be entitled to one vote in all proceedings or elections of said company, which may be given in person or by proxy.

SECTION. 6. After five thousand dollars of the stock of said company shall be subscribed and ten per cent. thereon paid in, an election may be held for not less than three nor more than seven directors, of which the same notice shall be given as required in section five, at the same time and place. Such articles of association and by-laws as may be deemed best for the government of the company and its officers, and the management of its affairs, may be adopted.

SECTION. 7. The directors shall hold their offices for one year and until their successors are chosen, which may be provided for in the articles of association or by-laws of said company. The directors shall have the management of all the business of said corporation, the application of its funds, the disposition of its property, and shall make all contracts and conveyances; all of which, how'er shall be in accordance with the articles of association and by-laws of said corporation.

SECTION 8. The said corporation, for the purposes herein expressed and authorized, may enter upon and take or flow any real estate
74 deemed necessary; provided that the said company shall pay the value of real estate and damage done by flowing or injuring lots or lands by the erection of the said dam, or any of the works of the company. For the purpose of ascertaining the value of such real estate, or the amount of such damage, the said company may apply by petition to the circuit or county court of said county, in which petition shall be set forth the point, as near as may be, at which the said company propose to build the said dam, or at which the same is built, and the height to which they propose to erect or have erected the same above low or the ordinary stage of water in said river, the property, particularly describing it, taken or proposed to be taken for the purposes herein authorized or to be flowed, occupied, or injured by the works of said company. Notice shall be given of the filing of such petition, or of the intention so to do, personally to the owners, if known, and by publication in at least two newspapers printed in said county, once in each for six weeks, stating in such notice the facts required to be set forth in the petition, the last of which publications shall be at least sixty days prior to the day on which said petition was heard or acted upon by said court. Any person owning or having an interest in such real estate, or any part

thereof, may upon application by filing in the court a statement of such ownership or interest, verified by his or her affidavit, be heard in such proceeding. Upon the hearing of such petition
75 the said court shall appoint five commissioners who shall be disinterested, and who shall take an oath faithfully to discharge the duties of their office, and three of whom shall be competent to act. The said commissioners or a majority of them shall at such time and place as the said court may direct, proceed to examine and estimate the value of such real estate as is proposed to be taken and the injury which may be done by the said dam of the works of the said company to the real estate flowed or to be flowed or injured thereby. The said commissioners may administer oaths and hear any evidence offered, and may personally inspect the property; and in estimating the damages shall consider the benefits to result from the works of the said company. The commissioners shall report to said court, stating the value of such real estate and the damages, setting forth the value of all damage to each parcel of real estate, separately. The said court upon receiving such report shall make an order condemning such real estate to the use of said company or its works; and the company shall thereupon, on demand, pay to the persons legally entitled thereto the amount so ascertained, provided the said court may for good cause shown order reassessment of the value or damages of such real estate or any portion thereof. The said company shall also pay all the costs of the proceedings.

76 SECTION 9. Any person owning lands taken, flowed or injured, may in like manner apply to said court to have the value of the same or the injury thereto ascertained, but no other or further proceedings shall be had against said company.

SECTION 10. The act shall be considered a public act. Approved February 15th, 1851.

Fifth. That on the 16th day of February, A. D. 1865, another act entitled "An act to amend an act entitled 'An act to authorize certain persons to construct a dam across Fox River for hydraulic and manufacturing purposes,' approved February 15th, 1851," which said act is as follows:

Be it enacted by the people of the State of Illinois, represented in the general assembly.

SECTION 1. That the said company shall have in addition to the powers granted in and by said act, to which this is an amendment, the right for all of the purposes mentioned in the said act, to build a dam across the Illinois river at such point as the said company may elect, and also the right to construct a race or races for the purpose of introducing the water of the Illinois River into the pool of the dam authorized to be erected across Fox River; and for any or all the purposes contemplated by this act, and by the act to which this is an amendment, may make and use such portion of any highway, street, alley, or public ground as may be deemed necessary.

77 SECTION 2. Section 9 (nine) of the act to which this is an amendment, is hereby amended by adding at the end of the same the following: "Provided, that no action or other proceeding shall be had against said company on account of the erection of said dams, race or races, unless within one year after the erection or construction of the same, or any or either of them."

SECTION 3. The fourth (4) section of said act, to which this is an

amendment, shall read as follows: "The capital stock of said company may be fixed by the same, and divided into shares, and may be increased or diminished." The name of "Henry G. Cotton," in the first section of the said original act, is stricken out, and the names of "Dwight Cameron" and "John F. Nash" are hereby inserted in its stead.

Approved February 16, 1865.

Sixth. On the 15th day of June, 1869, the city of Ottawa adopted the following ordinances:

First. An ordinance to provide for a loan for municipal purposes.

SECTION 1. Be it ordained by the city council of the city of Ottawa, that the mayor of the city be, and he is hereby, authorized to borrow in the name of the city, at a rate of interest not exceeding 10 per cent., the sum of $60,000 for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor in the sum of
78 $500.00, with interest payable annually, said bonds to be payable, one-third in five years, one-third in 10 years, and one-third in 15 years after the date thereof; provided that no application shall be made of the proceeds of said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured to the city.

SECTION 2nd. Be it ordained that a sufficient sum to pay the interest on said loan shall be annually provided by taxation and set apart as a separate fund, and to be applied to the payment of the interest on said bonds, and for no other purpose.

SECTION 3. This ordinance shall be submitted to the voters of the city, to be voted for or against, at an election to be held for that purpose on the 20th day of July, 1869. The matter of the determination shall be by depositing ballots, upon which shall be written or printed "For the loan ordinance," or "Against the loan ordinance."

2nd. On the 30th day of July, 1869, an ordinance to carry into effect the ordinance of June 15, 1869, entitled "An ordinance to provide for a loan for municipal purposes," as follows:

Whereas by an ordinance passed by the city council on the 15 of June, 1869, it was provided that the mayor of the city should be authorized to borrow in the name of the city $60,000.00, to be expended in developing the natural advantages of the city for
79 manufacturing purposes, and to issue the bonds of the city therefor; and whereas it was provided by said ordinance that the same shall be submitted to the voters of the city to be voted for or against at an election to be holden for that purpose, on the 20th day of July, 1869; and whereas at said election the said ordinance was ratified by the voters of the city by a majority of 823 votes, being a majority of the legal voters of the city.

Now, therefore, be it ordained by the city council of the city of Ottawa that the bonds of the city for the sum of $60,000.00 be issued by the mayor in accordance with the terms and conditions of said ordinance of June 15, 1869, and that he deliver the same to William H. W. Cushman, to be used by him in developing the natural resources and

surroundings of the city, and that the said Cushman is authorized and directed to expend the same in the improvement of the water-power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose by the legislature of the State, or which may hereafter be granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity; provided that said Cushman shall execute and deliver to the mayor an agreement from
80 him to the city of Ottawa that he will, without unreasonable or unnecessary delay, cause a good, substantial, and sufficient dam to be constructed across the Illinois River, above the city, to bring into use all the available water-power of said river at Ottawa, and will construct sufficient head and tail races to make such water-power available; said races to be constructed and continued to the Fox River, below the acqueduct, and above the island in Fox River, as fast as the same may be required for actual use, and as fast as said water-power can be leased at fair and reasonable rates and be brought into actual operation; and that he will also erect a good, substantial, and sufficient dam across Fox River so as to make available the water-power of both rivers at Ottawa as soon as the additional water-power created by such dam across Fox River can be brought into actual use by being leased at reasonable and fair rates, so as to have all of the available water-power of both rivers at Ottawa ready for use as rapidly as called for.

And provided, also, that said Cushman shall bind himself that if said work is not constructed as aforesaid that he will return said bonds to the city, or the value of the same, and save it harmless from all loss, on account of the same, or on account of interest accruing thereon, and in case said work shall not be completed by said
81 Cushman, then to return the pro rata share of said bonds in the proportion that the cost of the work constructed shall bear to the work not constructed; provided that at least one of the dams above-mentioned, with the races necessary to make the water-power thereby created available for practical use, shall be completed, or the whole of said bonds shall be returned to the city by said Cushman.

The intent of this ordinance being to secure the improvement and developing of said water-powers in this city by appropriating the loan obtained under the ordinance aforesaid for that purpose, or pro rata so far as said water-power shall be made available for practical use.

That under said ordinance of June 15th an election was held and a majority of the voters of Ottawa voted in favor of issuing said bonds.

In addition to the foregoing ordinances the following proceedings of the city council of the city of Ottawa in relation to said bonds were had, and the agreement with said Cushman, as appears from the records of said city council:

On the 14th day of June, 1870, at a regular meeting of said city council, * * * * On motion of Fiske, ordered, that a committee consisting of the mayor and three aldermen be appointed to wait upon W. H. W. Cushman and ascertain from him positively and definitely at what time he proposes to commence the work of the improve-
82 ment of the water-power in the vicinity of Ottawa, as per contract between him and the city of Ottawa.

July 12th, 1869, at regular meeting of said council the special committee appointed to confer with W. H. W. Cushman in relation to the

contract between him and the city of Ottawa, in the matter of the improvement of the water-power in the vicinity of Ottawa, reported that the committee had waited upon Mr. Cushman and from him have received the positive assurance that the stakes are now stuck.

That all the arrangements for the prosecution of the work are now perfected, and that before one year from this date the water would be pouring over the dam contracted to be constructed across the Illinois River.

And also the following proceedings of the city council of the city of Ottawa in relation to said bonds, viz:

TUESDAY, *May 11th*, 1869.

Regular meeting: Present, Mayor Shuler and Alderman Fiske, Thomas Freeman, Brunker, Hughes, Leonard, Clifford, Colwell, Osman, Burke, Besserman, Moore, Calkins. * * * Colwell submitted the following resolutions which was on motion of Calkins adopted.

Resolved, that the commissioners appointed to take stock for the city and of Ottawa to the amount of one hundred thousand dollars in the Ottawa Manufacturing Company be requested to take such stock in
83 the corporation created by the act entitled "An act to incorporate the Ottawa ManufacturingCompany, and to authorize said company to build a dam across the Illinois River, and to use the water-power thereby created," approved Feb'y 15th, 1851.

Which was revised and amended by a supplementary act approved Feb'y 16, 1865.

Provided said corporation will organize and open its books for subscriptions immediately, and provided further that it will commence improving the water-power at the earliest moment practicable.

On motion of Colwell, ordered that a committee of three be appointed to confer with the Ottawa Manufacturing Company in relation to provisions as in resolution directing commissioners to take stock for the city of Ottawa to the amount of $100,000 in said company.

Mayor Shuler appointed Colwell, Osman, and Fiske said committee.

Seventh. That the bonds set out in the declaration were issued according to their date and face as set forth in the declaration, and delivered to Wm. H. W. Cushman on the 2nd day of August, A. D. 1869, under the following agreement:

This agreement, made this 2nd day of August, A. D. 1869, between William H. W. Cushman, of Ottawa, Illinois, party of the first part, and the city of Ottawa, in the county of La Salle, Illinois, party
84 of the second part, witnesseth, that whereas the said Cushman has received from the city of Ottawa aforesaid, the bonds of the city to the amount of $60,000.00, to be used in developing the natural resources of the city for manufacturing purposes and to be expended in the improvement of the water-power upon the Illinois and Fox Rivers within the city and in the immediate vicinity thereof, said bonds having been issued by said city in pursuance of an ordinance passed by the city council of said city on the 15th day of June, 1869, entitled "An ordinance to provide for a loan for municipal purposes," which was ratified by the voters of the city on the 20th day of July, 1869, and of an ordinance passed by the city council of said city on the 30th day of June, A. D. 1869, entitled "An ordinance to provide for a loan for municipal purposes."

Now, therefor, in consideration of the premises, the said William H. W. Cushman, for himself, his heirs, executors, and administrators, doth

by these presents covenant and agree to and with the city of Ottawa aforesaid, that he will without unreasonable or unnecessary delay cause a good and substantial dam to be constructed across the Illinois River above the city sufficient to bring into use all the available water of said river at Ottawa, and will construct sufficient head and tail races to make such water-power available, said races to be constructed and continued in Fox River below the acqueduct and above the
85 Island as fast as the same may be required for actual use, and as fast as the water-power can be leased at fair and reasonable rates; and that he will also construct a good, substantial, and sufficient dam across the Fox River, below the aqueduct, whenever the same shall be necessary to make available the water-power of both rivers at Ottawa, and be necessary for the use of said water-power, and whenever the said water-power, made available by the construction of said dam across Fox River, can be leased at fair and reasonable rates so as to have all the available water-power of both rivers at Ottawa ready for use as rapidly as called for; and said Cushman also binds himself, his heirs, executors, and administrators, to and with said city, that in case said work is not performed to the extent of constructing a dam across the Illinois River, and races to make water-power thereby created available for practical use, that he will return said bonds, or the value thereof, to the city, and save and keep harmless the said city from all loss on account of the same, or on account of the interest accruing thereon; and in case the work shall be performed to the extent above indicated, but shall not be completed by the construction of all the dams and races heretofore specified, then said Cushman shall return to said city a pro rata share of said bonds of the value thereof, in proportion that the cost of the work constructed shall bear to the
86 costs of that part of the work not constructed, the said Cushman to be exonerated from all liability of any kind to the city, or on account of said bonds, when he shall have performed the agreements herein expressed to be performed by him at the time stipulated for the performance of the same, the bonds being appropriated by the city to secure the completion of said work, and without other consideration than the public benefit resulting to the city thereby; and it is hereby agreed that nothing in this contract, nor in the ordinances therein referred to, shall give to said city any right, title, interest, or ownership, whether in law or in equity, in the said improvements, when completed according to the conditions and stipulations herein contained.

In witness whereof, the said William H. W. Cushman set his hand and seal the day and year above written.

WILL. H. W. CUSHMAN.

And said city of Ottawa received no stock in said manufacturing company (or other consideration for said bonds) other than the said contract with said Cushman, hereinbefore set out; but the same were issued as a donation by the city of Ottawa to said Cushman, to be applied by said Cushman individually, or under such franchises as were, or might be, granted for the purpose of making said improvement; and the same were issued and delivered by the mayor and clerk of
87 said city of Ottawa, and not by the commissioners created by said act of the legislature, and without being placed in the hands of the commissioners aforesaid, appointed under the above-recited act, approved March 19th, 1867, and were issued and delivered to said Cushman, and there was no consent of said commissioners to

the issue of said bonds, and said commissioners took no part in the issue of said bonds.

Eighth. That no money whatever was borrowed by the mayor of the city of Ottawa, under and by virtue of the said ordinances of the city of Ottawa passed June 15th, 1869, and July 30th, 1869, but said bonds of the city of Ottawa were on the 2d day of August, A. D. 1869, executed and delivered to said William H. W. Cushman (by said mayor as a donation to aid it in securing the contemplated water-power in the city and its immediate vicinity) as hereinbefore set forth.

9th. That on the eleventh day of March, A. D. 1871, the said William H. W. Cushman delivered the said bonds to the said Ottawa Manufacturing Company, and to be used by the said company for the purpose of making the improvement hereinbefore mentioned, without further consideration and with'ut his endorsement thereon, said Cushman being at the time a director in said Ottawa Manufacturing Company.

88 Tenth. That said Ottawa Manufacturing Company at once entered upon the work of constructing the dams and races and partially constructed the same under the powers granted to it as above set forth, and completed said work so that some water-power was created, but that said dam was carried away by a freshet in 1872 or 1873 and has never been reconstructed.

Eleventh. That during the month of June, A. D. 1871, the Ottawa Manufacturing Company sold and delivered, without any endorsement whatever, the bonds described in the declaration in this cause to Lester H. Eames, a citizen of the city of Ottawa from their face value and part of the interest which had accrued after August, 1870. That the city of Ottawa paid the interest on the bond in suit due August 2d, 1870, and Aug. 2d, 1871.

12. That Eames knew of the proceedings of the common council in regard to the issue of the bonds, and knew that they were issued for the purpose of being used as a donation to aid in the completion of the contemplated improvement referred to in the contract between Cushman and the city, and that from the facts and circumstances I find that he knew of the contract between the city and Cushman in relation to the said bonds.

13. That Eames at the time he purchased the bonds read the recitals contained therein, and had never heard their validity questioned.

89 14. I further find that the question as to the policy of issuing the bonds, and as to their validity, was the subject of discussion by the people and the press of said city at about the time of their issue.

15. And when said bonds were read in evidence they were objected to by the defendant because they had not been endorsed by the payee therein named, but the court admitted the same, and the defendant excepted thereto.

16. That in the month of November, A. D. 1879, and after the bonds fell due the said Lester H. Eames sold and delivered said bonds without any endorsement to William H. Carey for value, the plaintiff in this cause, who then knew all the facts in regard to the purpose for which said bonds were issued, and to which they had been applied, that I have hereinbefore found were known to Eames at the time he, Eames, purchased the same.

Upon the finding of the foregoing facts the court finds the issue for the plaintiff, and finds the debt $50,900.00, and the damages $21,914.76, for which the court renders judgment for the plaintiff, to which finding of the issue and judgment the defendant at the time excepted, and

the court orders the foregoing findings to be made a part of the record.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 15, 1881. Wm. H. Bradley, cl'k.

It is agreed that this certificate is correct.

MOLONY & RICHOLSON.
G. S. ELDRIDGE.

90 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein the said William H. Cary is the plaintiff, and the said The City of Ottawa is the defendant, as appears from the records of said court, now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in the city of Chicago, in said district, this fifth day of October, A. D. 1881.

[SEAL.] WM. H. BRADLEY, *Clerk.*

91 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between William H. Cary, plaintiff, and The City of Ottawa, defendant, in an action of debt, a manifest error hath happened, to the great damage of the said The City of Ottawa, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1881, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of July, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 106th year.

[SEAL.] WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

(Indorsed:) Supreme Court of the United States. William H. Cary vs. The City of Ottawa. Writ of error.

92 Supreme Court of the United States. October term, A. D. 1881.

WILLIAM H. CARY
vs.
THE CITY OF OTTAWA. } Error to circuit court U. S. nor. dist. of Ills.

Assignment of errors.

1st. The court erred in admitting in evidence the said bonds, or either of them, on which said declaration was filed & suit brought, in the above-entitled cause, said bonds not being endorsed by the payee thereof.

2nd. The court erred in rendering judgment in favor of the plaintiff below, and in not rendering it in favor of the said defendant.

3rd. The court erred in rendering the judgment in manner and form aforesaid.

LAWRENCE, CAMPBELL & LAWRENCE.
M. T. MALONEY,
Atty's for Plaintiff in Error.

C. B. LAWRENCE,
Of Counsel.

93 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To William H. Cary, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1881, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The City of Ottawa is plaintiff, and you, the said William H. Cary, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should be not corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-one.

H. W. BLODGETT, *Judge.*

94 STATE OF ILLINOIS,
La Salle County, ss:

Samuel Richolson, being duly sworn, on his oath doth now depose and say that he personally delivered a correct copy of the within citation to Geo. S. Eldridge, who is attorney for the said Wm. H. Carey in said cause.

SAMUEL RICHOLSON.

Subscribed and sworn to before me this seventh day of October, A. D. 1881.

BENJ. F. LINCOLN,
Notary Public.

(Indorsed:) Supreme Court of the United State. The City of Ottawa vs. Wm. H. Carey. Citation to October term, A. D. 1881.

I have received a true & correct copy of the within citation this 7th day of October, A. D. 1881.

WM. H. CARY,
Pr. G. S. ELDRIDGE,
His Att'y.

(Indorsement on cover:) No. 1047. The City of Ottawa, plaintiff in error, vs. William H. Cary. N. Illinois. C. C. U. S. Filed 14th October, 1881.

108-110

SUPREME COURT U. S.
JAN 6 1882

IN THE

Supreme Court of the United States,

October Term, A. D. 1881.

CITY OF OTTAWA,
Plaintiff in Error,

vs.

WILLIAM H. CAREY,
Defendant in Error.

Error to Circuit Court, Northern District of Illinois.

Brief and Argument for Plaintiff in Error.

LAWRENCE, CAMPBELL & LAWRENCE,
AND
M. T. MALONEY,
For Plaintiff in Error.

C. B. LAWRENCE,
Of Counsel.

Beach, Barnard & Co., Legal Printers, 104 Randolph Street, Chicago.

IN THE

Supreme Court of the United States,

October Term, A. D. 1881.

CITY OF OTTAWA,
Plaintiff in Error,
vs.
WILLIAM H. CAREY,
Defendant in Error.

Error to Circuit Court, Northern District of Illinois.

STATEMENT.

At the October term, 1878, of this court, an opinion was filed in the case of *Hackett* v. *The City of Ottawa*, in which it was held that certain bonds issued by the city of Ottawa were valid, when in the hands of innocent purchasers for a valuable consideration.

The present suit is upon a part of the same series of bonds, but differs from the former in this most important particular, namely, that while Hackett, the former plaintiff, was admitted to have bought the bonds without notice of any defect in them, or illegality in their issue, the plaintiff in this case was a purchaser with full notice of all the facts upon which we rely as showing their invalidity. This case was submitted to the court without a jury, and this notice is one of the findings of fact.

In the former case the court also discussed, to some extent, the question whether the bonds were given for a corporate or municipal purpose, but came to no conclusion on that point.

The court said:

"But a direct decision of that question does not seem "to be essential to the disposition of this case. We "content ourselves with stating the propositions which "counsel have urged upon our consideration, and without "expressing any settled opinion as to what are corporate "purposes within the meaning of the Illinois constitution, "we pass to another point, which, in our judgment, is "fatal to the defense." The court then proceeds to show that the purchaser was entitled to protection as a purchaser without notice.

It is apparent to the court, from the foregoing remarks, that this suit is brought upon certain bonds issued by the city of Ottawa, State of Illinois. Various special pleas were filed, but it was finally agreed that a jury should be waived, the case should be tried by the court, and all defenses admitted under the general issue that would be admissible under any special pleas that could be filed. These agreements are in the record. The case was tried in pursuance of these stipulations, and the court found the facts specially, and gave judgment for the plaintiff for the amount of the bonds and interest. To this judgment the city prosecutes a writ of error. We have prefixed to our argument the findings of the court, but we will state the facts here in a more concise form.

On the 15th of February, 1851, the legislature of Illinois passed an act creating W. H. W. Cushman and certain other persons named in the act a corporation under the name of the "Ottawa Manufacturing Company," and

gave it authority to erect a dam across Fox river, at a specified point near the city of Ottawa "for the purpose of "creating a water power," and to "use, lease or otherwise "dispose of the same, and to construct such other works, "building and machinery as may be deemed necessary "or proper to use such water power to promote the in- "terests and objects of the company."

The company was incorporated chiefly to create a water power at Ottawa, but also with leave to use it as the interests of the company might dictate.

On the 16th of February, 1865, another act was passed, amending the former act, and giving the company power to erect a dam across the Illinois river as well as the Fox, and to construct certain water races.

We now call the attention of the court to another act of the legislature set out at length in the findings, entitled "An act to authorize the city of Ottawa to subscribe "to the stock of the Ottawa Manufacturing Company," approved February 19th, 1867. This was the company created by the first of the acts above mentioned.

The act of 1867, now referred to, was in fact an act amending the charter of the city of Ottawa. It was entitled "An act to authorize the city of Ottawa to subscribe "to the stock of the Ottawa Manufacturing Company." It created certain persons named in the act a board of commissioners, and this board was authorized "for and "on behalf of said city to subscribe to the capital stock of "the Ottawa Manufacturing Company the sum of one "hundred thousand dollars, and when fully paid, to re- "ceive and hold the stock of said company for the "same, and the proceeds thereof for and on behalf of "said city."

The act further authorized said commissioners, in order to raise the money for such subscription, to make, execute and dispose of bonds of the city to the amount of one hundred thousand dollars, with a proviso that the bonds should not be disposed of for less than their par value.

The act further required the city council to collect an annual tax, after being notified by the commissioners of the issuance of said bonds, for the purpose of paying the interest on the same, and to pay the proceeds of such tax over to the commissioners.

The board of commissioners was required to elect a president, secretary and treasurer, and to appoint a proxy to vote the city stock. It was also authorized to sell the city stock and pay the city bonds or invest the proceeds of sale in bonds of the United States. Vacancies in the board were to be filled by the circuit court of La Salle county.

The court will perceive that by this amendment of the city charter the whole subject of using the money or credit of the city to aid in the creation of a water power was committed to a board of commissioners, named by the legislature, and to their successors in office, to be appointed by the circuit court.

On the 15th of June, 1869, the city council of Ottawa passed an ordinance authorizing the mayor to borrow, upon the bonds of the city, the sum of six thousand dollars, "to be expended in developing the natural advantages "of the city for manufacturing purposes."

This ordinance was ratified at a popular election held on the 20th of July, 1869. On the 30th of the same month another ordinance was passed to provide the means

of carrying into effect the previous ordinance. It directed the mayor to issue bonds to the amount of sixty thousand dollars and deliver them "to William H. W. Cushman, to "be used by him in developing the natural resources and "*surroundings* of the city," and authorized said Cushman "to expend the same in the improvement of the "water power upon the Illinois and Fox rivers within the "city, *and in the immediate vicinity thereof, under the fran-* "*chises and powers which have been granted for that pur-* "*pose*, in the manner which, in his judgment, shall best "secure the practical and permanent use of said water "power in the city and its immediate vicinity."

The ordinance further provided that Cushman should execute and deliver to the mayor his obligation that he would, without unreasonable delay, and by proper appliances, "bring into use all the available water of the two "rivers at Ottawa, as fast as it might be required for "actual use, and as fast as it could be leased at fair and "reasonable rates, the intent of this ordinance being to "secure the improvement and development of said water "power in this city by appropriating the loan obtained "under the ordinance aforesaid for that purpose, or *pro* "*rata* so far as said water power shall be made available "for practical use." The ordinance further provided that Cushman should bind himself to return the bonds, and save the city harmless from all loss, if the work should not be constructed.

It further appears, by the findings, that the Board of Commissioners, created by the act of February 15th, 1876, was duly organized by the election of the proper officers; and after the passage of the ordinance of July 30, 1869, authorizing the issue of the bonds in question, the city council passed a resolution requesting the commissioners to subscribe to the stock of the manufacturing

company, and appointed a committee to confer with the commissioners, but the commissioners did not subscribe to said stock, or concur in issuing said bonds; but, in the language of the finding, the bonds "were issued and de-"livered by the mayor and clerk of said city of Ottawa, "and not by the commissioners created by said act of the "legislature, and without being placed in the hands of the "said commissioners aforesaid, appointed under the above "recited act, approved March 10th, 1867, and were issued "and delivered to the said Cushman, and there was no "consent of said commissioners to the issue of said bonds, "and said commissioners took no part in the issue of said "bonds."

The bonds were issued to W. H. W. Cushman, named in the act creating the "Manufacturing Company" as its first incorporator; and the only consideration received therefor was an agreement on his part, set out at length in the proceedings, that he would construct a good and substantial dam across the Illinois river and Fox river, and such head and tail races as might be necessary to make the water power available, and, in case of failure to make the water power available, he would return the bonds or the value thereof to the city, and keep it harmless on its bonds.

The contract further provided that "nothing in this "contract, nor in the ordinances therein referred to, shall "give to said city any right, title, interest or ownership, "whether in law or in equity, in the said improvement, "when completed, according to the conditions and stipu-"lations herein contained."

It further appeared by the findings that Cushman, having received the bonds, delivered them without endorsement or consideration, to the Ottawa Manufacturing Com-

pany, of which he was a director, and that company sold them to Lester H. Eames, a citizen of Ottawa, for their face value, and a part of the accrued interest, and the court further found that "Eames knew of the proceed-"ings of the common council in regard to the issuing of "the bonds, and knew that they were issued for the pur-"pose of being used as a donation to aid in the comple-"tion of the contemplated improvement referred to in the "contract between Cushman and the city, and from the "fact and circumstances I find that he knew of the con-"tract between the city and Cushman in relation to the "said bonds."

It further appears from the findings, that said contract with Cushman expressly sets forth that said bonds are to be used in creating a water power for *manufacturing purposes*, and that Eames and Carey, at the time of making said contract, were acquainted with that fact.

It further appears from the findings that said Eames sold the bonds to the present plaintiff after their maturity: and the court finds that the plaintiff not only took the bonds after maturity, but that he had the same knowledge of the purpose for which said bonds were issued and to which they had been applied, that the court found against Eames.

The court further found that the "Ottawa Manufac-"turing Company at once entered upon the work of con-"structing the dams and races, and partially constructed "the same under the powers granted to it as above set "forth, and completed said work, so that some water "power was created, but that said dam was carried away "by a freshet in 1872 or 1873, and has never been re-"constructed."

THE FOLLOWING IS, IN FULL, THE FINDINGS OF FACT BY THE COURT.

Be it remembered that heretofore, to wit, on the 23rd, day of February, A. D. 1881, the above entitled cause came on for trial, and it was then and there agreed by and between the plaintiff and defendant, by an instrument of writing, signed by the respective counsel, and filed in said cause, that a jury should be waived, and said cause should be submitted to the court for trial, and the parties having also agreed that any and all defenses to said action, which would be admissible under any special plea herein, should also be admitted under the general issue, and the court having heard all the evidence in said cause, doth find the following facts.

FIRST. The city of Ottawa, defendant herein, has been from the 10th day of February, A. D. 1853, a city of the State of Illinois, incorporated under a charter which, among other things contains the following:

"Article 5, Section 1. The city council shall have "power and authority to levy and collect taxes upon all "property, real and personal, within the limits of the city, "not exceeding one-half of one per cent. per annum upon "the assessed value thereof, and may enforce the pay- "ment of the same in any manner to be prescribed by "ordinance not repugnant to the constitution of the United "States, and of this State."

"Article 5, Sec. 3. The city council shall have power "* * * * * * to establish, support and regulate "common schools, to divide the city into school districts, "to borrow money on the credit of the city, and to issue "bonds therefor, and pledge the revenue of the city for "the payment thereof, provided, that no sum or sums of

" money shall be borrowed at a greater interest than at " ten per cent. per annum."

" Article 10, Sec. 20. No money shall be borrowed " by the city council until the ordinance passed therefor " shall be submitted to, and voted for by, a majority of " the voters of said city, attending an election held for " that purpose."

SECOND. That said charter has been amended from time to time, as follows: By an act approved March 1st, 1854, entitled " An act to amend the charter of the city " of Ottawa, authorizing said city to take stock in a bridge " company therein named, and providing that the cor- " porate authorities of said city may levy a tax therein for " the purpose of paying the interest upon any bonds or " other securities issued by the city for that purpose; said " tax shall be levied as other taxes for said city purposes " are, or may by law be, required to be."

Also, by an act entitled, " An act to authorize the city " of Ottawa to subscribe to the stock of the Ottawa " Manufacturing Company," as follows:

" *Be, it enacted by the people of the State of Illinois,* " *represented in General Assembly:*

" SECTION 1. That William Reddick, Milton H. Swift, " Jeremiah Wood, George Avery and Richard Thorne, " be and they hereby *are* constituted a board of commis- " sioners for and on behalf of said city, to subscribe to the " capital stock of the Ottawa Manufacturing Company " the sum of one hundred thousand dollars, and, when " fully paid to receive and hold the stock of said company " for the same, and the proceeds thereof for and on behalf " of said city.

" SEC. 2. In order to raise the money to enable said

"commissioners to make such subscriptions, they are "hereby authorized, for and on behalf of said city to "make, execute and dispose of bonds of the same to the "amount of one hundred thousand dollars, in sums of not "less than one thousand dollars, at a rate of interest not "exceeding ten per centum per annum, payable in not less "than ten years, irrevocably pledging the faith and re- "sources of said city for the ultimate redemption of the "same, and for the payment of the interest thereon. "Such bonds shall not be disposed of by said commis- "sioners for less than their par value.

"SEC. 3. The city council of said city is hereby au- "thorized and required annually after being notified by "said commissioners of the issuance of such bonds to "levy and collect as other taxes are levied and collected, "and at the same time and in the same manner, not less "than six mills on each dollar of the assessed value of "the real and personal property in said city. The pro- "ceeds of such tax to be paid over by the collector of "said city to the treasurer thereof, and by him kept as a "separate fund subject to the order of said commissioners "for the payment of the interest on said bonds, and in "case of a surplus, the said commissioners shall invest "the same in bonds of the United States, or of the State "of Illinois for the ultimate redemption of such bonds.

"SEC. 4. The said commissioners may appoint a presi- "dent, and a secretary who shall be treasurer. The lat- "ter shall give bonds to said city, conditioned for the "faithful discharge of his duties, and they may also ap- "point a proxy to vote on said stock at any meeting of "the stockholders of said company, and instruct such "proxy in what manner to vote, but no vote shall be "given on said stock for either of such commissioners for "directors of said company.

"SEC. 5. Said commissioners may, at any time, dis-
"pose of such stock at not less than its par value, and
"any holder of any such bonds may, at any time, ex-
"change the same for an equal amount of said stock. In
"case of a sale of said stock, or of any portion of the
"same, the said commissioners shall, if practicable, take
"up said bonds, and if not, shall invest the proceeds in
"bonds of the United States, or the State of Illinois.
"Said commissioners shall keep a record of their pro-
"ceedings, and annually report to the city council their
"doings herein. Said commissioners shall be allowed all
"reasonable expenses, but no compensation for their ser-
"vices. In case of a vacancy in said board by death,
"resignation, refusal or neglect to act, or removal from
"the county of La Salle, the circuit court of said county
"shall fill such vacancy.

"Approved, February 19th, 1867."

Also by an act to amend an act entitled: "An act to charter the city of Ottawa, approved February 10th, 1853," as follows:

"Section 1, Chapter 2. When the bonds now held
"against the city of Ottawa shall become due, the city
"council of said city are hereby authorized to cause other
"bonds, for the same sum or sums, and on the same terms
"and for such time as the city council may deem proper, to
"be issued and delivered to the holder of said bonds now
"held against said city. And the city council are hereby
"authorized, in addition to the taxes now authorized to be
"levied and collected by said city to levy and collect in the
"same manner and at the same time as other city taxes
"are levied and collected, a tax not exceeding two mills
"on each dollar of the assessed value of the real and per-
"sonal property in said city, said tax, when collected, to

"be paid to the city treasurer, and by him to be kept "as a separate fund to pay off the bonds so held against "said city. Said separate funds may be invested in bonds "of the United States or of this State.

"Approved March 5th, 1867."

THIRD. That on or about the first day of July, A. D. 1867, the commissioners appointed by the said act of February 19th, A. D. 1867, viz: William Reddick, Milton H. Swift, Jeremiah Wood, George Avery and Richard Thorne met, and duly organized as such Board of Commissioners, by electing Milton H. Swift president and John F. Nash secretary of said Board of Commissioners.

That after the organization of said Board of Commissioners, and prior to the 15th day of June, A. D. 1869, the city council took steps to secure a subscription by the said Board of Commissioners to the capital stock of said Ottawa Manufacturing Company, and to secure shares of its stock therefor, under said act of February 19th, 1867, but said Board of Commissioners failed to make such subscriptions, and to procure such stock in that behalf.

FOURTH. That on the 15th day of February, 1851, the legislature of the State of Illinois passed an act entitled "An Act to authorize certain persons to construct a dam "across Fox river for hydraulic and manufacturing pur- "poses," which act was as follows:

"*Be it enacted by the People of the State of Illinois, repre-* "*sented in the General Assembly:*

"SEC. 1. That William H. W. Cushman, George E. "Walker, John V. A. Hoes, George H. Norris, Lorenzo "Leland and Henry G. Cotton, or such of them, or such "other persons as may choose to associate with them, by "subscribing to the stock of the company as hereinafter au- "thorized, are hereby created a body corporate and politic

"by the name of the 'Ottawa Manufacturing Company,' "and by that name shall have perpetual succession, and be "capable of contracting and being contracted with, of "suing and being sued, of acquiring either by purchase or "under the provisions of this act, as hereinafter authorized, "and of holding real estate and personal property, for the "purposes contemplated and authorized by this act, or in "discharge of debts due the said corporation, and of using "and disposing of the same; may have a common seal, "which they may alter at pleasure, and may make all "needful by-laws for the government of the company, its "officers, and the management of its affairs, and alter the "same at pleasure; may appoint or provide for the election "of such officers and agents as may be deemed necessary, "and prescribe the duties and liabilities of all the officers of "said company.

"SEC. 2. The said company, when formed, are hereby "authorized to build a dam across Fox river, on section "11 or 12, in Township 33, North of Range 3, East, in "LaSalle county, for the purpose of creating a water-"power, and the said company may use, lease or other-"wise dispose of the same, and may construct such other "works, buildings and machinery as may be deemed "necessary or proper to use such water, and to promote "the interests and objects of the company.

"SEC. 3. The said company, having first obtained the "assent of the corporate authorities of the town of Ot-"tawa, may use any of the streets, alleys or public "grounds in the said town for the purpose of creating "such power, or of using or applying the same, as herein "provided and authorized.

"SEC. 4. The capital stock of said company shall not

"exceed $50.000, which shall be divided into shares of "one hundred dollars each.

"SEC. 5. The persons named in the first section of "this act, or a majority of them, or of the survivors of "them, if any shall die, may cause books of subscription "to the capital stock of said company to be opened at "some public place, after having given notice of the same "for at least thirty days, by publication in some newspaper "printed in said county. Any person may become a "stockholder in said company, by subscribing at least "one share and paying for the same, and all assessments "thereon, when called for. Each share shall be entitled "to one vote in all proceedings or elections of said com-"pany, which may be given in person or by proxy.

"SEC. 6. After five thousand dollars of the stock of "said company shall be subscribed, and ten per cent. "thereon paid in, an election may be held for not less "than three, nor more than seven directors, of which the "same notice shall be given as required in section 5; at "the same time and place such articles of association and "by-laws as may be deemed best for the government of "the company and its officers, and the management of its "affairs, may be adopted.

"SEC. 7. The directors shall hold their offices for one "year, and until their successors are chosen, which may "be provided for in the articles of association, or by-laws "of said company. The directors shall have the man-"agement of all the business of said corporation, the ap-"plication of its funds, the disposition of its property, and "shall make all contracts and conveyances; all of which, "however, shall be in accordance with the articles of "association and by-laws of said corporation.

"SEC. 8. The said corporation, for the purposes here-
"in expressed and authorized, may enter upon and take or
"flow any real estate deemed necessary, provided that the
"said company shall pay the value of such real estate and
"damage done by flowing or injuring lots or lands by the
"erection of the said dam, or any of the works of the com-
"pany.

"For the purpose of ascertaining the value of such real
"estate, or the amount of such damage, the said company
"may apply by petition to the circuit or county court of
"said county, in which petition shall be set forth the
"point, as near as may be, at which the said company pro-
"pose to build the said dam, or at which the same is built,
"and the height to which they propose to erect, or have
"erected the same above low or the ordinary stage of
"water in said river, the property, particularly describing
"it, taken or proposed to be taken for the purposes here-
"in authorized, or to be flowed, occupied or injured by the
"works of said company. Notice shall be given of the
"filing of such petition, or of the intention so to do, per-
"sonally to the owners, if known, and by publication in at
"least two newspapers in said county, once in each week
"for six weeks, stating in said notice the facts required to
"be set forth in the petition, the last of which publications
"shall be at least sixty days prior to the day on which
"said petition was heard or acted upon by said court.
"Any person owning or having an interest in such real
"estate, or any part thereof, may upon application and by
"filing in court a statement of such ownership or interest,
"verified by his or her affidavit, be heard in such pro-
"ceedings. Upon the hearing of such petition the said
"court shall appoint five commissioners, who shall be dis-
"interested, and who shall take an oath faithfully to dis-

"charge the duties of their office, any three of whom "shall be competent to act. The said commissioners or a "majority of them, shall at such time and place as the said "court may direct, proceed to examine and estimate the "value of such real estate, as is proposed to be taken, and "the injury which may be done by the said dam or works "of the said company to the real estate flowed, "or to be flowed, or injured thereby. The said "commissioners may administer oaths and hear any "evidence offered, and may personally inspect the "property, and in estimating the damages shall "consider the benefits to result from the works of said "company. The commissioners shall report to said court, "stating the value of such real estate, and the damages, "setting forth the value of all damages to each parcel of "real estate separately; the said court upon receiving such "report shall make an order condemning such real estate "to the use of said company or its works, and the com-"pany shall thereupon, on demand, pay to the persons "legally entitled thereto, the amount so ascertained, pro-"vided the said court may, for good cause shown, order "re-assessment of the value or damages of such real es-"tate or any portion thereof; the said company shall also "pay all the costs of the proceedings.

"SEC. 9. Any person owning lands taken, flowed or "injured, may in like manner, apply to said court to have "the value of the same, or the injury thereto ascertained, "but no other or further proceedings shall be had against "said company.

"SEC. 10. This act shall be considered a public act. "Approved, February 15th, 1851."

FIFTH. That on the sixteenth day of February A. D. 1865, the legislature of the State of Illinois passed an-

other act entitled "An act to amend an act, entitled "'an act to authorize certain persons to construct a "dam across Fox river, for hydraulic and manufacturing "purposes,' approved February 15th, 1851," which said act is as follows:

"*Be it enacted by the People of the State of Illinois, repre-*
"*sented in General Assembly:*

"Sec. 1. That the said company shall have in addi-"tion to the powers granted in and by said act, to which "this is an amendment, the right for all of the pur-"poses mentioned in the said act, to build a dam across "the Illinois river at such point as the said company may "elect, and also the right to construct a race or races for "the purpose of introducing the water of the Illinois "river into the pool of the dam authorized to be erected "across Fox river, and for any or all the purposes con-"templated by this act, and by the act to which this is an "amendment, may take and use such portion of any high-"way, street, alley, or public ground as may be deemed "necessary.

"Sec. 2. Section 9 of the act to which this is an "amendment is hereby amended by adding at the end of "the same the following: 'Provided that no action or "other proceeding shall be had against said company on "account of the erection of said dam, race or races, unless "within one year after the erection or construction of the "same or any or either of them.'

"Sec. 3. The 4th section of said act to which this is "an amendment shall read as follows: 'The capital "stock of said company may be fixed by the same, and "divided into shares and may be increased or dimin-"ished.'

"Sec. 4. The name of 'Henry G. Cotton,' in the first

"section of said original act, is stricken out, and the "names of 'Dwight Cameron,' and 'John F. Nash,' are "hereby inserted in its stead.

"Approved February 16th, 1865."

SIXTH. That on the 15th day of June, 1869, the city of Ottawa adopted the following ordinances:

First. "An ordinance to provide for a loan for municipal purposes.

"SEC. 1. Be it ordained by the city council of the "city of Ottawa that the mayor of the city be and he is "hereby authorized to borrow in the name of the city, at "a rate of interest not exceeding 10 per cent., the sum of "$60,000, for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued "therefor in the sum of $500.00, with interest payable "annually, said bonds to be payable one-third in five "years, one-third in 10 years, and one-third in 15 years "after the date thereof, provided that no application shall "be made of the proceeds of said bonds, except for the "purpose aforesaid, and in pursuance of an ordinance to "be passed for that purpose by the city council, nor until "the faithful application of the proceeds of such bonds to "the purpose aforesaid shall be fully secured to the city.

"SEC. 2. Be it ordained that a sufficient sum to pay the "interest on said loan shall be annually provided by taxation, and set apart as a separate fund, and to be applied "to the payment of the interest on said bonds, and for no "other purpose.

"SEC. 3. This ordinance shall be submitted to the "voters of the city to be voted for or against at an election to be held for that purpose on the 20th day of July, "1869. The matter of the determination shall be by de-

"positing ballots upon which shall be written or printed "'For the loan ordinance' or 'Against the loan ordi- "nance.'"

Second. On the 30th day of July, 1869, an ordinance to carry into effect the ordinance of June 15, 1869, entitled "An ordinance to provide for a loan for municipal pur- "poses," as follows:

"WHEREAS, by an ordinance passed by the city council "on the 15th of June, 1869, it was provided that the "mayor of the city should be authorized to borrow in "the name of the city $60,000, to be expended in devel- "oping the natural advantages of the city for manufac- "turing purposes, and to issue the bonds of the city "therefor; and whereas, it was provided by said ordi- "nance that the same shall be submitted to the voters of "the city to be voted for or against, at an election to be "holden for that purpose on the 20th day of July, 1869; "and whereas, at said election, the said ordinance was "ratified by the voters of the city by a majority of 823 "votes, being a majority of the legal voters of the city:

"NOW, THEREFORE, be it ordained by the city council "of the city of Ottawa, that the bonds of the city for the "sum of $60,000, be issued by the mayor in accordance "with the terms and conditions of said ordinance of June "15th, 1869, and that he deliver the same to William "H. W. Cushman, to be used by him in developing the "natural resources and surroundings of the city, and that "the said Cushman is authorized and directed to expend "the same in the improvement of the water-power upon "the Illinois and Fox rivers within the city and in the "immediate vicinity thereof, under the franchises and "powers which have been granted for that purpose by "the legislature of the State, or which may hereafter be

"granted for that purpose in the manner which in his "judgment shall best secure the practical and permanent "use of said water-power in the city and its immediate "vicinity; provided, that said Cushman shall execute "and deliver to the mayor an agreement from him to the "city of Ottawa that he will, without unreasonable or un- "necessary delay, cause a good, substantial, and sufficient "dam to be constructed across the Illinois river above the "city, to bring into use all the available water power of "said river at Ottawa, and will construct sufficient head "and tail races to make such water power available; said "races to be constructed and continued to the Fox river "below the aqueduct and above the island in Fox river, "as fast as the same may be required for actual use, and "as fast as said water power can be leased at fair and "reasonable rates, and be brought into actual operation, "and that he will also erect a good, substantial and suffi- "cient dam across Fox river so as to make available the "water power of both rivers at Ottawa, as soon as the "additional water power created by such dam across Fox "river can be brought into actual use by being leased at "reasonable and fair rates, so as to have all of the availa- "ble water power of both rivers at Ottawa ready for use "as rapidly as called for. And provided, also, that said "Cushman shall bind himself that if said work is not con- "structed as aforesaid, that he will return said bonds to "the city, or the value of the same, and save it harmless "from all loss on account of the same, or on account of "interest accruing thereon, and in case said work shall "not be completed by said Cushman, then to return the "*pro rata* share of said bonds in the proportion that the "cost of the work constructed shall bear to the part of "the work not constructed; provided that at least one of "the dams above mentioned, with the races necessary to

"make the water power thereby created available for "practical use shall be completed, or the whole of said "bonds shall be returned to the city by said Cushman.

"The intent of this ordinance being to secure the im- "provement and development of said water powers in this "city, by appropriating the loan obtained under the ordi- "nance aforesaid for that purpose, or *pro rata*, so far as "said water power shall be made available for practical "use."

That under said ordinance of June 15th, an election was held, and a majority of the voters of Ottawa voted in favor of issuing said bonds.

In addition to the foregoing ordinances the following proceedings of the city council of the city of Ottawa, in relation to said bonds, were had, and the agreement with said Cushman, as appears from the records of said city council. On the 14th day of June, 1870, at a regular meeting of said city council, * * * * "on "motion of Fiske, ordered that a committee consisting of "the mayor and three aldermen be appointed to wait on "W. H. W. Cushman, and ascertain from him positively "and definitely at what time he proposed to commence the "work of the improvement of the water power in the vi- "cinity of Ottawa, as per contract between him and the "city of Ottawa."

July 12, 1870, at a regular meeting of said council the special committee appointed to confer with W. H. W. Cushman in relation to the contract between him and the city of Ottawa, in the matter of the improvement of the water power in the vicinity of Ottawa, reported that 'the committee had waited on Mr. Cushman, and from him had received the positive assurance that the stakes were now stuck: that all the arrangements for the prosecution

of the work are now perfected, and that before one year from this date the water would be pouring over the dam, contracted to be constructed across the Illinois river.'

And also the following proceedings of the city council of the city of Ottawa, in relation to said bonds, viz:

"Tuesday, May 11, 1869. Regular meeting; present, "Mayor Shuler and aldermen Fiske, Thomas, Freeman, "Brunker, Hughes, Leonard, Clifford, Colwell, Osman, "Burke, Bosserman, Moore and Calkins. * * * * "Colwell submitted the following resolution, which was, "on motion of Calkins, adopted:

"*Resolved*, That the commissioners appointed to take "stock for the city of Ottawa, to the amount of $100,000. "in the Ottawa Manufacturing Company, be requested to "take such stock in the corporation created by the act "entitled 'An Act to incorporate The Ottawa Manufac- "turing Company, and to authorize said company to build "a dam across the Illinois river, and to use the water "power thereby created.' Approved Feb'y., 1851, "which was revived and amended by a supplementary "act approved Feb'y. 16, 1865.

"Provided said corporation will organize and open its "books for subscriptions immediately; and, provided fur- "ther, that it will commence improving the water power "at the earliest moment practicable.

"On motion of Colwell, ordered that a committee of "three be appointed to confer with the Ottawa Manufac- "turing Company in relation to the provisions as in resolu- "tion directing commissioners to take stock for the city of "Ottawa, to the amount of $100,000. in said company.

"Mayor Shuler appointed Colwell, Osman and Fiske "said committee."

SEVENTH. That the bonds set out in the declaration were issued according to their date and face, as set forth in the declaration, and delivered to William H. W. Cushman, on the 2d day of August, 1869, under the following agreement:

"THIS AGREEMENT, made this second day of August, A. "D. 1869, between William H. W. Cushman, of Ottawa, "Illinois, party of the first part, and the city of Ottawa, in "the county of LaSalle, Illinois, party of the second part, "witnesseth, that whereas, the said Cushman has received "from the city of Ottawa, aforesaid, the bonds of the city, "to the amount of sixty thousand dollars, to be used in "developing the natural resources of the city for manu- "facturing purposes, and to be expended in the improve- "ment of the water power upon the Illinois and Fox "rivers, within the city and in the immediate vicinity "thereof, said bonds having been issued by said city in "pursuance of an ordinance passed by the city council of "said city on the 15th day of June, 1869, entitled 'An "Ordinance to provide for a loan for municipal purposes,' "which was ratified by the voters of the city on the 20th "day of July, 1869, and of an ordinance passed by the city "council of said city on the 30th day of July, A. D. 1869, "entitled "An Ordinance to carry into effect the ordinance "of June 15th, 1869, entitled, 'An Ordinance to provide "for a loan for municipal purposes.'"

"NOW, THEREFORE, in consideration of the premises, "the said William H. W. Cushman, for himself, his heirs, "executors and administrators, doth by these presents "covenant and agree to and with the city of Ottawa, "aforesaid, that he will, without unreasonable or unneces- "sary delay, cause a good and substantial dam to be con- "structed across the Illinois river, above the city, suf-

"ficient to bring into use all the available water power of "said river at Ottawa, and will construct sufficient head "and tail races to make such water power available, said "races to be constructed and continued in Fox river be- "low the aqueduct and above the island, as fast as the "same may be required for actual use, and as fast as the "water power can be leased at fair and reasonable rates, "and that he will also construct a good, substantial and "sufficient dam across the Fox river, below the aqueduct, "whenever the same shall be necessary to make available "the water power of both rivers at Ottawa, and be nec- "essary for the use of said water power, and whenever "the said water power made available by the construc- "tion of said dam across Fox river can be leased at fair "and reasonable rates, so as to have all of the available "water power of both rivers at Ottawa ready for use as "rapidly as called for, and said Cushman also binds him- "self, his heirs, executors and administrators, to and with "said city, that in case said work is not performed to the "extent of constructing a dam across the Illinois river, "and races to make water power thereby created avail- "able for practical use, that he will return said bonds, or "the value thereof to the city, and save and keep harmless "the said city from all loss on account of the same, or on "account of the interest accruing thereon, and in case the "work shall be performed to the extent above indicated, "but shall not be completed by the construction of all the "dams and races heretofore specified, then said Cushman "shall return to said city a *pro rata* share of said bonds "or the value thereof, in proportion that the cost of the "work constructed shall bear to the cost of that part of "the work not constructed. The said Cushman to be ex- "onerated from all liability of any kind to the city or on

"account of said bonds, when he shall have performed "the agreements herein expressed to be performed by "him at the time stipulated for the performance of the "same, the bonds being appropriated by the city to se- "cure the completion of said work, and without other con- "sideration than the public benefit resulting to the city "thereby; and it is hereby agreed that nothing in this con- "tract, nor in the ordinances therein referred to shall give "to said city any right, title, interest or ownership, whether "in law or in equity in the said improvements when com- "pleted, according to the conditions and stipulations herein "contained.

"IN WITNESS WHEREOF, the said William H. W. Cush- "man set his hand and seal the day and year above written.

"WILL H. W. CUSHMAN."

And said city of Ottawa received no stock in said manufacturing company, or other consideration for said bonds, other than the said contract with said Cushman hereinbefore set out, but the same was issued as a donation by the city of Ottawa to said Cushman, to be applied by said Cushman individually, or under such franchises as were or might be granted for the purpose of making said improvement, and the same were issued and delivered by the mayor and clerk of said city of Ottawa, and not by the commissioners created by said act of the legislature, and without being placed in the hands of the commissioners aforesaid, appointed under the above recited act, approved March 19th, 1867, and were issued and delivered to said Cushman, and there was no consent of said commissioners to the issue of said bonds, and said commissioners took no part in the issue of said bonds.

EIGHTH. That no money whatever was borrowed by the mayor of the city of Ottawa under and by virtue of the said

ordinances of the city of Ottawa, passed June 15th, 1869, and July 30th, 1869, but said bonds of the city of Ottawa were, on the 2d day of August, A. D. 1869, executed and delivered to the said Wm. H. W. Cushman, by said mayor, as a donation to aid in securing the contemplated water power in the city and its immediate vicinity, as hereinbefore set forth.

NINTH. That on the eleventh day of March, A. D. 1871, the said Wm. H. W. Cushman delivered the said bonds to the said Ottawa Manufacturing Company, to be used by the said company for the purpose of making the improvement hereinbefore mentioned, and without further consideration and without his endorsement thereon, said Cushman being at the time a director in said Ottawa Manufacturing Company.

TENTH. That said Ottawa Manufacturing Company at once entered upon the work of constructing the dams and races, and partially constructed the same under the powers granted to it as above set forth, and completed said work so that some water power was created, but that said dam was carried away by a freshet in 1872 or 1873, and has never been reconstructed.

ELEVENTH. That during the month of June, A. D. 1871, the Ottawa Manufacturing Company sold and delivered, without any endorsement whatever, the bonds described in the declaration in this cause, to Lester H. Eames, a citizen of the city of Ottawa, for their face value and part of the interest which had accrued after August, 1870. That the city of Ottawa paid the interest on the bonds in suit due August 2d, 1870, and August 2d, 1871.

TWELFTH. That Eames knew of the proceedings of

the common council in regard to the issue of the bonds and knew that they were issued for the purpose of being used as a donation to aid in the completion of the contemplated improvement referred to in the contract between Cushman and the city, and from the facts and circumstances, I find that he knew of the contract between the city and Cushman in relation to the said bonds.

THIRTEENTH. That Eames, at the time he purchased the bonds, read the recitals contained therein, and had never heard their validity questioned.

FOURTEENTH. I further find that the question as to the policy of issuing the bonds, and as to their validity, was the subject of discussion by the people and the press of said city at about the time of their issue.

FIFTEENTH. And, when said bonds were read in evidence, they were objected to by the defendant, because they had not been endorsed by the payee therein named, but the court admitted the same, and the defendants excepted thereto.

SIXTEENTH. That in the month of November, A. D. 1879, and after the bonds fell due, the said Lester H. Eames sold and delivered said bonds, without any endorsement, to William H. Carey, for value, the plaintiff in this cause, who then knew all the facts in regard to the purpose for which said bonds were issued, and to which they had been applied, that I have hereinbefore found were known to Eames at the time he, Eames, purchased the same.

Upon the findings of the foregoing facts, the court finds the issue for the plaintiff, and finds the debt $50,900, and the damages $21,914.76, for which the court renders judgment for the plaintiff; to which finding of the issue

and judgment the defendant at the time excepted. And the court orders the foregoing findings to be made a part of the record.

H. W. BLODGETT, *Judge.*

It is agreed that this certificate is correct.

MALONEY & RICHOLSON.
G. S. ELDRIDGE.

(Endorsed):

Filed July 15th, 1881.
WM. H. BRADLEY, *Clk.*

ERRORS ASSIGNED.

I. The court erred in finding the issue for the plaintiff.

II. The court erred in not finding the issue in favor of the defendant.

III. The court erred in receiving in evidence the bonds sued upon, without an endorsement by the payee therein named.

IV. The court erred in rendering judgment in favor of the plaintiff, in manner and form aforesaid.

V. The court erred in not rendering judgment in favor of the defendant.

VI. General assignment.

BRIEF.

On the foregoing facts we submit to the court the following five propositions:

I.

THE BONDS IN QUESTION, ISSUED BY A CORPORATION CREATED BY THE LEGISLATURE OF ILLINOIS, AND POSSESSED OF NO AUTHORITY TO ACT EXCEPT AS GIVEN BY THE LEGISLATURE, CAN BE ASSIGNED ONLY ACCORDING TO THE LAWS OF ILLINOIS, AND THESE LAWS, AS EXPOUNDED BY THE SUPREME COURT OF THE STATE, HAVE ALWAYS REQUIRED AN ASSIGNMENT BY ENDORSEMENT, IN ORDER TO VEST IN THE ASSIGNEE THE LEGAL TITLE.

AUTHORITIES.

Garvin v. *Wiswell*, 83 Ill., 218.
New Hope Delaware Bridge Co. v. *Perry*, 11 Ill., 467.
Johnson v. *County of Stark*, 24 Ill., 75.
Supervisors v. *Hubbard*, 45 Ill., 139.
Town of Eagle v. *Kohn*, 84 Ill., 292.
Turner v. *P. & S. R. R. Co.*, 95 Ill., 143.
Nesmith v. *Sheldon*, 7 How., 817.
Jefferson Bank v. *Skelly*, 1 Black, 443.
Leffingwell v. *Warren*, 2 Black, 603.
U. S. Bank v. *Donnally*, 8 Pet., 372.
Parsons on Notes and Bills, Vol. II, 355.
Trimbey v. *Vignier*, 1 Bing., N. C., 151.

II.

THE LEGISLATURE OF ILLINOIS COULD NOT, UNDER THE CONSTITUTION OF THE STATE, AUTHORIZE A TOWN OR CITY TO ISSUE ITS BONDS FOR ANY BUT CORPORATE PURPOSES, AND A DONATION OF BONDS TO A PRIVATE CORPORATION, ESTABLISHED FOR THE PURPOSE OF CREATING A WATER POWER, TO BE OWNED EXCLUSIVELY BY ITSELF, WAS NOT AN ISSUE OF BONDS FOR A CORPORATE PURPOSE, AND SUCH BONDS, IN THE HANDS OF A PURCHASER WITH NOTICE, ARE VOID.

AUTHORITIES.

Town of South Ottawa v. *Perkins*, 4 Otto, 262.
People v. *Depuyt*, 71 Ill., 653.
Pendleton County v. *Amy*, 13 Wall., 304.
Kenicott v. *Supervisors*, 16 Wall., 452.
St. Jo. Township v. *Rogers*, 16 Wall., 644.
Town of Coloma v. *Eaves*, 2 Otto, 484.
Rogers v. *Burlington*, 3 Wall., 671.
Supervisors v. *Weider*, 64 Ill., 427.
Livingston County v. *Neider*, 64 Ill., 432.
Johnson v. *County of Stark*, 24 Ill., 75.
Bissell v. *City of Kankakee*, 64 Ill., 251.
English v. *The People*, 96 Ill., 569.
Loan Association v. *Topeka*, 20 Wall., 655.
Lowell v. *Boston*, 111 Mass., 460.
People v. *Bacheller* 53 N. Y., 143.
Jones on R. R. Securities, Sec. 123, *et seq.*
Ohio Valley Iron Works v. *Moundsville*, 11 W. Va., 1.
Wilkesbarre City Hospital v. *County of Luzerne*, 84 Pa. St., 55.

III.

IF THE PURPOSE FOR WHICH THESE BONDS WERE ISSUED CAN BE CONSIDERED A CORPORATE PURPOSE, THE BONDS, IN ORDER TO BE VALID, SHOULD HAVE BEEN ISSUED BY AUTHORITY OF THE BOARD OF COMMISSIONERS SPECIALLY APPOINTED BY THE LEGISLATURE TO TAKE CHARGE OF THIS WHOLE MATTER—TO SUBSCRIBE THE STOCK, AND TO ISSUE AND SELL, AT PAR, THE BONDS OF THE CITY TO RAISE THE MONEY FOR ITS PAYMENT.

AUTHORITIES.

Town of South Ottawa v. *Perkins*, 4 Otto, 269.

Township of East Oakland v. *Skinner*, 4 Otto, 258.

Middleport v. *Ætna Life Ins. Co.*, 82 Ill., 562.

Supervisors v. *People ex rel. R. R. Co.*, 25 Ill., 181.

Gaddis v. *Richland Co.*, 92 Ill., 119.

Brush v. *Ware*, 15 Pet., 93.

McClure v. *Oxford*, 4 Otto, 432.

IV.

EVEN IF THE BONDS CAN BE CONSIDERED AS HAVING BEEN ISSUED FOR A CORPORATE PURPOSE, AND IF THEY HAD BEEN ISSUED BY THE PROPER AUTHORITIES, NAMELY, THE BOARD OF COMMISSIONERS, THEY WOULD STILL BE UNCOLLECTIBLE BY THE PRESENT PLAINTIFF, BECAUSE HE BOUGHT WITH NOTICE THAT THEY WERE ISSUED TO CUSHMAN IN CONSIDERATION OF HIS CONTRACT TO BUILD "A GOOD AND SUBSTANTIAL DAM ACROSS THE ILLINOIS AND

"FOX RIVERS SUFFICIENT TO BRING INTO USE ALL THE "AVAILABLE WATER," AND TO PROTECT THE CITY ON THESE BONDS IN CASE HE DID NOT CREATE THE WATER POWER, WHICH CONTRACT HE WHOLLY FAILED TO PERFORM.

V.

THE STATUTE AUTHORIZED THE COMMISSIONERS TO SUBSCRIBE TO THE STOCK OF THE MANUFACTURING COMPANY AND REQUIRED THEM TO "RAISE THE MONEY" FOR PAYMENT OF THE SUBSCRIPTION, BY ISSUING AND SELLING BONDS AT NOT LESS THAN PAR. THE MAYOR ISSUED THE BONDS DIRECTLY TO CUSHMAN FOR DELIVERY TO THE MANUFACTURING COMPANY. EVEN IF THE BONDS WERE OTHERWISE FREE FROM EXCEPTION, THIS DISPOSITION OF THEM WAS ILLEGAL.

AUTHORITIES.

Scipio v. *Wright*, 101 U. S., 665.
Middleport v. *Ætna Life Ins. Co.*, 82 Ill., 563.

VI.

THE JUDGMENT OF THE CIRCUIT COURT WAS ERRONEOUSLY RENDERED, BECAUSE THAT COURT WAS WITHOUT JURISDICTION TO RENDER ANY JUDGMENT ON THE MERITS.

AUTHORITIES.

Parsons on Notes and Bills, Vol. II, Chap. 2, p. 35.
Dillon on Municipal Corporations, § 404.
Ex parte Watkins, 3 Pet., 205.
Rhode Island v. *Mass.*, 12 Pet., 718.
Scott v. *Sandford*, 19 How., 393.

ARGUMENT.

I.

THE BONDS IN QUESTION, ISSUED BY A CORPORATION CREATED BY THE LEGISLATURE OF ILLINOIS, AND POSSESSED OF NO AUTHORITY TO ACT EXCEPT AS GIVEN BY THE LEGISLATURE, CAN BE ASSIGNED ONLY ACCORDING TO THE LAWS OF ILLINOIS, AND THESE LAWS, AS EXPOUNDED BY THE SUPREME COURT OF THE STATE, HAVE ALWAYS REQUIRED AN ASSIGNMENT BY ENDORSEMENT, IN ORDER TO VEST IN THE ASSIGNEE THE LEGAL TITLE.

We proceed with the discussion of the first of the foregoing propositions, which is, that the bonds in suit being payable, not to bearer, simply, but to W. H. W. Cushman or bearer, were not assignable by delivery merely, but only by endorsement, so as to vest the legal title in the assignee, and enable him to sue.

We are aware that this question was before this court in the case of *Roberts* v. *Bolles*, 101 U. S. Rep., 122, and decided adversely to our position, but we trust we shall be able to show the court that that decision was an error, arising from the fact that the decisions of the Supreme court of Illinois upon this question were not fully brought before the court, and no one of the judges upon this bench has been made familiar, by practice, with the local laws of Illinois. Upon this subject of negotiable instruments, including the mode of their assignment, our statutes are peculiar, but their construction, from the beginning, has been entirely harmonious. There has never been the slightest change.

The settled rule established by the courts of Illinois is, that while a coupon or other instrument, payable as coupons always are, simply to bearer, and not to A. B. or bearer, is negotiable by delivery; a bond or other instrument, payable to A. B. or bearer, is negotiable only by endorsement, so as to pass the legal title.

This court, in the case of *Roberts* v. *Bolles*, above cited, expressed itself as follows:

"It is true that the Supreme Court of Illinois, in *Hil-*
"*born* v. *Artus*, (4 Ill., 344), held that under a statute
"of that State, then in force, notes payable to a person
"or bearer could not be transferred, or assigned by de-
"livery only, so as to authorize the holder by delivery to
"sue in his own name.

"'There is one way', the court said, 'by which he can
"do so, and that is by virtue of the assignment endorsed
"on the note itself. The endorsement gives the right to
"sue in the name of the assignee.' That construction of
"the Illinois statute was followed in *Roosa* v. *Crist*, 17 *id.*,
"450. But *New Hope Delaware Bridge Co.* v. *Perry* (11
"*id.*, 467), decides that bank notes payable to bearer, or to
"a particular person or bearer, are not embraced by the
"provisions of the statute, or by the reasons which caused
"its passage; and that the holder, by delivery, merely,
"can maintain an action thereon, unless it appears that he
"obtained them *mala fide*. 'The statute,' it was said,
"'applies only to instruments that were not negotiable by
"the common law, or the custom of merchants.'

"In *Johnson* v. *County of Stark* (24 *id.*, 75), the court
"put municipal bonds and coupons on the footing, in this
"respect, of bank bills, and thus brought that class of
"commercial securities within the rule announced in *New*
"*Hope Delaware Bridge Co.* v. *Perry*. Its language

"was: 'It seems to be the well settled doctrine that "state, county, city, and other bonds and public securities "of this character, are negotiable by delivery only, with- "out endorsement, in the same manner as bank bills, "especially when they are payable to bearer.'

"Subsequently, in *Supervisors of Mercer County* v. "*Hubbard* (45 *id.*, 139), which was an action on coupons "attached to bonds issued by a county in payment of a "railroad subscription, the court said: 'More recent "decisions place these coupons in the condition of bank "bills, payable to bearer, and no one will deny such bills "can be given in evidence in a suit by the bearer against "the bank issuing them, under the common counts. We "see no difference between coupons payable to bearer for "a sum certain, and a bank bill. They alike pass by "delivery only.' Finally, in *Town of Eagle* v. *Kohn* (84 "*id.*, 292), it was said: 'It is the well settled doctrine, "that bonds of this character are to be treated as com- "mercial paper, and this court has held coupons attached "to them to be negotiable by delivery only, without "endorsement.'

"It is thus seen that by repeated adjudications of that "court, prior to the statute of 1874, municipal bonds pay- "able to bearer were excepted from the rule announced "in *Hilborn* v. *Artus*, and *Roosa* v. *Crist*.

"But all doubt upon the subject is removed by the "eighth section of the act approved March 18, 1874, re- "vising the laws of Illinois in relation to promissory notes, "bonds, due-bills and other instruments of writing, which "was in force when this action was commenced. It pro- "vides 'that any note, bond, bill, or other instrument in "writing, made payable to bearer, may be transferred "by delivery thereof, and an action may be maintained

"thereon in the name of the holder thereof.' (Rev. Stat. "Ill., 719, Sec. 8).

"This act, though not in force when defendants in error "acquired the bonds in suit, applies, we think, to actions "commenced after it took effect.

"We are satisfied that this plea, tested alone by the "law of Illinois, and without reference to the decisions of "this court upon the subject of commercial securities, is "insufficient."

We think we can demonstrate to the court that in basing the decision of that case upon the supposed authority of the Supreme Court of Illinois, it committed an error.

We will first quote the opinion of the Supreme Court of Illinois, in the case of *Garvin* v. *Wiswell*, 83 Ill., 217, where the precise question was presented and decided. Probably this case was not presented to this court in the argument of *Roberts* v. *Bolles*, but it had been decided and the opinion had then been published.

The bond in question was a county bond.

The court says in that case:

"It is insisted, on behalf of the plaintiff, that, as the "bond was payable to Murphy, or bearer, and was never "endorsed by him, the legal title did not pass to the de-"fendant, while, on the other hand, it is contended that "the legal title passed by delivery.

"Under the language of our statute in force at the time "the defendant obtained the bond, we entertain no doubt "it was a negotiable instrument.

"Sec. 3, Gross' Statutes of 1869, 461, declares, 'all prom-"issory notes, bonds, due bills and other instruments in "writing made or to be made by any person or persons, "body politic or corporate, whereby such person or per-

"sons promise or agree to pay any sum of money, shall "be taken to be due and payable, and the sum therein "mentioned shall, by virtue thereof, be due and payable "to the person to whom said note, bond, bill or other in- "strument in writing is made.'

"Section 4 declares, 'Any such note, bond, bill or other "instrument in writing, made payable to any person, shall "be assignable by indorsement thereon under the hand or "hands of such person, and of his, her or their assignee, "in the same manner as bills of exchange are, so as abso- "lutely to transfer and vest the property thereof in each "and every assignee or assignees successively.'

"The bond in question was an instrument in writing, "whereby the county, by its officers, promised at a cer- "tain time to pay John Murphy a certain sum of "money, and as clearly falls within the provisions of the "statute as would a promissory note. See also, Sec. 1500, "Vol. 2, p. 435, Daniel on Negotiable Instruments, and "cases cited in the note.

"*If the bond had been payable to bearer, we understand* "*the law to be well settled that it could have been negotiated* "*by delivery, without being indorsed. In such case the legal* "*title to the instrument would pass the same as a bank bill, by* "*mere delivery. Johnson* v. *Stark Co.*, 24 Ill., 75; *Jones* v. "*Nellis*, 41 Ill., 482.

"*This bond was not, however, payable to bearer, but* "*to John Murphy, or bearer, and it has been uniformly* "*held, in this state, that a negotiable instrument, pay-* "*able to a person named, or bearer, could not be trans-* "*ferred so as to vest the legal title except by indorsement.* "*Roosa* v. *Crist*, 17 Ill., 451; *Wilder* v. *De Wolf*, 24 Ill., "191.

"So far, therefore, as the legal title to the instrument

"is concerned, under the decisions of this state, it re-
"mained in the original payee, John Murphy; but while
"the legal title to a negotiable instrument can not be
"transferred except by indorsement, the equitable title
"may and often does pass by sale and delivery."

This is the settled law of Illinois, and always has been, as stated by the court. Now let us examine the cases upon which this court based its ruling, in *Roberts* v. *Bolles*.

It will be observed that this court, after correctly stating the Illinois rule, as first laid down in *Hilborn* v. *Artus*, 3 Scam., or 4 Ill., 344, and followed in subsequent cases, goes on to cite *New Hope Del. Bridge Co.* v. *Perry*, 11 Ill., 467; *Johnson* v. *County of Stark*, 24 *ib.*, 75; *Supervisors of Mercer County* v. *Hubbard*, 45 *ib.*, 139, and *Eagle* v. *Kohn*, 84 *ib.*, 292, and infers, from these cases, that the rule in regard to assignments is not applied by our courts to municipal bonds.

But not one of the cases cited relates to municipal bonds. They relate only to coupons, and the difference in Illinois between a bond payable to A. B., or bearer, and a coupon payable simply to bearer, without the mention of any person as payee, is just the difference between an instrument transferable by indorsement only, and one transferable by delivery without endorsement.

In the case of *New Hope Del. Bridge Co.* v. *Perry*, 11 Ill., 467, first cited by the court to support its views, the action was against a bank upon its own bills, and the court held that bank bills being universally treated as money, were not within our statute in regard to negotiable instruments, and passed by delivery without endorsement.

In *Johnson* v. *County of Stark*, the court did use the language quoted by this court, as follows: "It seems to "be the well settled doctrine that state, county, city, and "other bonds and public securities of this character are "negotiable by delivery only, without endorsement, in the "same manner as bank bills, especially when they are "payable to bearer." But the bond in that case *was* endorsed by the payee, and the question was simply upon the coupon, which was payable to bearer, without naming a payee. What was said about bonds was simply the dictum of the judge writing the opinion, and a merely careless expression. The case related only to a coupon, with no payee named.

In the case next quoted, *Supervisors* v. *Hubbard*, 45 Ill., 139, the action was on coupons only, and the court expressly confines itself, in its utterances, to an action on coupons. It says: "More recent decisions place these "*coupons* in the condition of bank bills payable to bearer."

So in the last case cited by this court, *Town of Eagle* v. *Kohn*, 84 Ills., 292, the action was on coupons, and the court, after saying that the "bonds were to be treated as "commercial paper," and therefore, of course, requiring an endorsement under our statute to pass the legal title, said the *coupons* were negotiable by delivery only, without endorsement.

The Supreme Court of Illinois was, therefore, literally correct when it said, in *Garvin* v. *Wiswell*, above cited, speaking of municipal bonds: "It has been *uniformly* "held in this state, that a negotiable instrument, payable "to a person named or bearer, could not be transferred "so as to vest the legal title, except by endorsement."

The decisions of our court could not have been other-

wise, under our statute entitled "Negotiable Instruments," because it says (section 3): "All promissory notes, *bonds*, "due bills and other instruments in writing, made or to be "made, by any person, *body politic* or corporate, whereby," &c.; and section 4 continues: "any such note, *bond*, bill, "or other instrument in writing, *made payable to any* "*person named as payee thereon*, shall be assignable by "*endorsement thereon*."

There can be but one construction of this statute, which is the one our Supreme Court has always given it, and the reason why our court draws a distinction between a bond or note "payable to any person named as payee therein," and one not payable to a person named as payee therein, but simply to bearer, is because our statute, *in totidem verbis* makes this precise distinction.

We, therefore, respectfully say, this court clearly erred in consequence of a want of familiarity with our local law, when, in *Roberts* v. *Bolles*, it construed the decisions of our court as holding that municipal bonds, payable to A. B. or bearer, are assignable by delivery without endorsement. This has never been held in a single case, but, on the contrary, it has been held that a municipal bond, payable to a person named therein, or bearer, cannot be assigned without endorsement. This court says, however, in *Roberts* v. *Bolles*, that, however the law might be under the old statute, there is no doubt about assignment by delivery under the act of March 18, A. D. 1874, a part of which it quotes. But here, too, the Supreme Court of the State, whose construction of the statute of the State must be conclusive upon this court, holds directly the opposite doctrine.

In *Turner* v. *P. & S. R. R. Co.*, 95 Ill., 143, this question was before the court, and it held expressly that the

statute of 1874 had *not* changed the former rule. The language of the court was as follows:

"The decision might be placed on the single ground "that the intervening petitioners are not in fact assignees, "in any sense, of the receiver's certificate. They are "simply what they represent themselves to be, viz: *bona* "*fide* holders of the certificate for a valuable consideration. "It was never endorsed to them by the payee by any "writing on the back or otherwise. Such title as they "have, passed to them by delivery. The certificate is "made payable to a particular person named 'or bearer,' "and the insistence is, that under our recent statute in re- "lation to negotiable instruments, the holders may bring "an action in their own names, and be entitled to the "same protection against defenses as an assignee of a "negotiable instrument before maturity under the former "statute, without the endorsement in writing of the party "named as payee. That proposition can hardly be main- "tained. The act of 1874, relied on, provides: 'Any "note, bond, bill, or other instrument of writing, made "payable to bearer, may be transferred by delivery there- "of, and an action may be maintained thereon in the "name of the holder thereof.'

"In this case the certificate issued by the receiver was "made payable to the party named, 'or bearer,' without "authority from the court from which he obtained au- "thority to act in the premises. * * * * *

"The certificate is not made payable to 'bearer.' It is "payable to a particular person by name, 'or bearer.'

"By our statute, all notes, bonds, bills, or other instru- "ments in writing, made to any person or corporation, "for the payment of money or articles of personal prop- "erty, 'shall be taken to be due and payable, and the

"sum of money, or articles of personal property therein "mentioned, shall, by virtue thereof, be due and pay- "able, as therein expressed.' Such instruments are only "assignable, under our law, so as to enable the assignee "to maintain an action in his own name by the person "named as payee, by indorsement thereon under the "hand of such person. It makes no difference that such "instruments contain in addition to the name of the payee, "the words 'order' or 'bearer.' *The recent statute has "not repealed the former law, that made the indorsement "under the hand of the payee necessary, so as absolutely "to transfer and vest the property of negotiable instru- "ments in the assignee.*"

It is impossible for this court to say, in this case, as it has said in some others in regard to municipal bonds, that having, in a former decision, followed the decisions of the state courts, it will not change its own decision simply because the state court has thought proper to do so. There is no former decision of the state court under which this court can shelter the decision rendered in *Roberts* v. *Bolles*. It was a simple misapprehension of what the Supreme Court of Illinois has said, and it confounded an action upon a coupon payable simply to bearer, without naming a payee, with an action upon a bond payable to a person named therein as payee, or bearer. The law of Illinois is to-day, and always has been, without variableness or shadow of turning, from the time our statute of negotiable instruments first came under construction by the Supreme Court in *Hilborn* v. *Artus*, forty years ago, down to the present hour, that a note or bond, municipal or otherwise, payable to a person named as payee therein or bearer, could be assigned only by endorsement, while a note or bond, payable to bearer simply, without naming

any person as payee, could be assigned by mere delivery. For the court to have held that a distinction could be drawn between a promissory note given by a natural person, and a city or county bond, would have been directly in the teeth of the statute.

And the court never so held. The words of the statute are "promissory notes, *bonds*, due-bills, and other instru-"ments in writing, made or to be made by any person, "*body politic* or corporate."

We respectfully ask if the instrument in the case at bar is not a bond issued by a *body politic*, viz: the city of Ottawa? The phrase "body corporate," used also in the statute, might probably have been construed as referring to private corporations, but there is no door open for construction as to the meaning of the phrase "*body politic*."

We respectfully submit, then, that the only question before this court, under this head of our argument, is, whether it will follow the uniform construction of the Supreme Court of Illinois upon a local statute, or will treat such decisions with contempt.

Here is a municipal corporation, created by the legislature of Illinois, deriving from that legislature all the powers it possesses, issuing its bond to a citizen of Illinois who sells it to another citizen of Illinois, by whom, after its maturity and when it has become dishonored paper, it is sold to the plaintiff.

Now, is the rule which governs the negotiability of that paper to be made to depend upon the statute of Illinois, or upon the usages of Wall Street?

Of course the statutes of Illinois must govern, however much it may differ from the law of other states.

If this court does not follow the fixed construction of the Supreme Court of Illinois upon this Illinois statute, then there is no reason why the construction of that court upon any other statute of Illinois should be regarded.

In *Nesmith* v. *Sheldon*, 7 How., 817, this court said, in reference to following the construction given by the state courts to the statutes of the state:

"And it is the established doctrine of this court, that it "will adopt and follow the decisions of the state courts in "the construction of their own constitution and statutes, "when that construction has been settled by the decision "of its highest judicial tribunal. After the decision above "mentioned, therefore, the question certified cannot be "considered as open for argument in this court."

And again, in *Jefferson Bank* v. *Skelly*, 1 Black, 443, the court said:

"We answer to this, as the court has repeatedly said, "whenever an occasion has presented for its expression, "that its rule of interpretation has invariably been, that "the construction given by the courts of the states to state "legislation and to state constitutions have been conclu- "sive upon this court, *with a single exception*, and that is "when it has been called upon to interpret the contracts "of states, though they have been made in the forms of "law, or by the instrumentality of a state's authorized "functionaries, in conformity with state legislation."

And again, in *Leffingwell v. Warren*, 2 Black, 603, the court said:

"The construction given to a statute of a state by the "highest judicial tribunal of such state, is regarded as a "part of a statute, and is as binding upon the courts of "the United States as the text."

These bonds were executed in Illinois, by a corporation of Illinois to a citizen of Illinois—W. H. W. Cushman—and assigned by him, in Illinois, to Lester W. Eames, a citizen of Illinois, without endorsement. By the statutes of Illinois, as construed by its highest court, Eames acquired no title. The suit is brought in Illinois and the *lex fori* and *lex loci contractus* are therefore the same.

In *U. S. Bank* v. *Donnally*, 8 Peter, 372, Mr. Justice STORY said: "An instrument may be negotiable in one "state, which may yet be incapable of negotiability by the "laws of another state, and the remedy must be in the "courts of the latter on such instrument according to its "own laws." This makes the law of the forum govern.

Parsons, in his work on Notes and Bills, 2d ed., 355, condemns this, and cites the English cases, holding that the holder of a bill of exchange made and assigned without endorsement in France, whose law, like that of Illinois, requires an endorsement in order to make a valid assignment, cannot recover against the acceptor in the courts of England, although the English law required no endorsement.

Mr. Parsons says: "A transfer, when good where "made, may be binding so far as the *parties to it* are con- "cerned,but no further."

In *Trimbey* v. *Vignier*, 1 Bingham, N. C., 151, TINDAL, C. J., said: "The question, therefore, is, "whether the law in France by which the indorsement in "blank does not operate as a transfer of the note, is a rule "which governs and regulates the interpretation of the "contract, or only relates to the mode of instituting and "conducting the suit; for in the former case it must be

"adopted by our courts, in the latter it may be alto-
"gether disregarded, and the suit commenced in the name
"of the present plaintiff. And we think the French law
"on the point above mentioned is the law by which the
"contract is governed, and not the law which regulates
"the mode of suing.

"If the endorsement has not operated as a transfer, that
"goes directly to the point, and there is no contract upon
"which the plaintiff can sue. Indeed, the difference in
"the consequences that would follow if the plaintiff sues
"in his own name, or is compelled to use the name of the
"former indorser as the plaintiff by procuration, would be
"very great in many respects, particularly in its bearing
"on the law of set-off; and with reference to those con-
"sequences, we think the law of France falls in with the
"distinction above laid down, that it is a law which
"governs the contract itself, not merely the mode of suing.
"We therefore think that our courts of law must take
"notice that the plaintiff could have no right to sue in his
"own name upon these contracts in the courts of the
"country where such contracts were made, and that such
"being the case there, we must hold in our courts that he
"can have no right of suing here."

As Illinois is both the place of the forum and the place of the contract, it matters not to us whether the *lex fori* or the *lex loci contractus* is applied. Under either rule the plaintiff in this case can maintain no action in Illinois in his own name.

We respectfully submit, therefore, that the rule laid down by this court in *Roberts* v. *Bolles* must be admitted to have been founded upon a misapprehension of the local law of Illinois.

We should add, this point did not arise in *Hackett* v. *City of Ottawa*, which was a suit upon coupons.

II.

We now proceed to the discussion of our second proposition, which is as follows:

THE LEGISLATURE OF ILLINOIS COULD NOT, UNDER THE CONSTITUTION OF THE STATE, AUTHORIZE A TOWN OR CITY TO ISSUE ITS BONDS FOR ANY BUT CORPORATE PURPOSES, AND A DONATION OF BONDS TO A PRIVATE CORPORATION, ESTABLISHED FOR THE PURPOSE OF CREATING A WATER POWER, TO BE OWNED EXCLUSIVELY BY ITSELF, WAS NOT AN ISSUE OF BONDS FOR A CORPORATE PURPOSE, AND SUCH BONDS, IN THE HANDS OF A PURCHASER WITH NOTICE, ARE VOID.

It is the settled law, everywhere, that "a municipal "corporation cannot issue bonds in aid of extraneous "objects without legislative authority, of which all persons "dealing with such bonds must take notice at their peril." This is the language of Mr. Justice BRADLEY, speaking for this court in *Town of South Ottawa* v. *Perkins*, 4 Otto, 262.

Under the constitution of Illinois in force when the bonds in question were issued, the courts go still further, and hold that the legislature is absolutely *prohibited* by the constitution from granting power to such corporations to assess taxes or incur debts for any but *corporate* purposes.

In the case of *People* v. *Dupuyt*, 71 Ill., 653, the Supreme Court said: "It has frequently been held by "this court, and must be regarded as well settled, that

"this clause of the constitution is a limitation upon the "taxing power of the state; that taxation cannot be "imposed by a corporation, except for local or corporate "purposes." The court cites:

Johnson v. *Campbell*, 49 Ill., 316.
Harward v. *St. Clair Drainage Co.*, 51 *ib.*, 130.
Madison County v. *People*, 58 *ib.*, 456.

The question then arises, were the bonds in this case issued for a corporate purpose?

In *Pendleton County* v. *Amy*, 13 Wallace, 304, this court said: "Without legislative authority a municipal "corporation, like a county, may not subscribe to the capi- "tal stock of a railroad company and bind itself to pay its "subscription or issue its bonds in payment; and if it does, "the purchaser of such bonds is affected by the want of "authority to make them."

This principle, that a municipality can not issue its bonds in aid of a railway unless specially authorized thereto by the legislature, has often been asserted by this court.

Kenicott v. *Supervisors*, 16 Wall., 452.
St. Joseph Township v. *Rogers*, 16 Wall., 644.
Town of Coloma v. *Eaves*, 2 Otto, 484.

These cases establish the principle that the building of a railroad into a town is not a corporate purpose.

What is a corporate purpose? The question is answered in the dissenting opinion of Mr. Justice FIELD, in which the Chief Justice, Mr. Justice GRIER, and Mr. Justice MILLER, concurred, in the case of *Rogers* v. *Burlington*, 3 Wallace, 671.

The language is as follows:

"I might proceed and show that the purpose for which "the bonds in this case were issued, was not within the "objects to be accomplished by the charter of incorpo- "ration; that those objects were such as are usually con- "templated in the creation of a municipal corporation,— "the establishment of a local government, the securing of "peace, good order and health within the corporate lim- "its, and the promotion of such measures as would con- "duce to the general good of the municipality, and that "the power to borrow money was restricted to the pur- "poses declared. But it is unnecessary to pursue the "matter further."

In the opinion of the majority of the court, in the same case, we find this language:

"*None of the decided cases which maintain the power of* "*the state legislatures to authorize such material aid in* "*the construction of railroads, decide, or even intimate,* "*that the power may be exercised without limit, or be ex-* "*tended to a public enterprise entirely foreign to the gen-* "*eral objects which the corporation was created to subserve.* "Those adjudications are not obnoxious to any such "charge; but the theory maintained is, that a railroad is "nothing more than an improved highway, and that it is "as competent for the legislature to authorize a munici- "pal corporation to furnish material aid in the construc- "tion of a railroad connected with the same, as to con- "struct a highway."

Here the majority of the court seems to intimate that to aid the building of a railway may be taxation for a municipal purpose, regarding a railway as an improved highway, but say that no case has "even intimated that the power

"can be extended to a public enterprise entirely foreign to "the general objects which the corporation was created to "subserve."

As we have already remarked, this precise question was before this court at the October Term, 1878, in *Hackett* v. *City of Ottawa*, but its decision was expressly reserved. The learned justice, who wrote the opinion, and discussed this branch of the case to some extent in the light of the Illinois decisions, seemed rather to favor the proposition, that these bonds were issued for a corporate purpose. The learned judge in considering this question, attached some importance to the decisions of the state court sustaining the bonds issued during the late war to save municipalities from a draft by raising bounties for volunteers. We must again be permitted to say, as we said in the argument of the former case, that those decisions were rendered under a pressure of circumstances which should make us consider them as of such doubtful authority, that at least we should guard against their being drawn into precedents for any extension of their principles. In the case of the *Board of Supervisors* v. *Weider*, 64 Ill., 427, the Supreme Court of the state said in commenting on these cases, "the court went far enough in upholding that "tax."

But we respectfully ask, how can those cases, supposing them to have been properly decided, sustain the bonds under consideration? There is an aspect in the former question in which a corporate purpose may be discovered in the object of the bonds. A town or city is created for the security of life and person, as well as property. For that purpose police officers, sheriffs and constables are created. Now, the raising of volunteers for the war, many of whom came from beyond the limits of the town offering

the bounty, was a measure calculated to save the lives of the citizens of the town offering the bounty from exposure to wounds and death, and enabling them to remain where they could support their families, and thus, in many cases, save the town from the necessity of assuming that charge. This might be said to fall within that purpose, in organizing a town, which has reference to the safety of its inhabitants.

But let us respectfully ask, under what corporate purpose can be classed a donation of money to a private corporation to enable it to construct dams and water races, or manufacture cloth, or build hotels?

In *Wilkesbarre City Hospital* v. *County of Luzerne*, 84 Pa. St., 55, the question was as to the constitutionality of a statute passed to provide for the support, out of the county treasury, of the sick and injured poor, when under treatment in hospitals in certain cities and boroughs, and which provided that "it shall be lawful for "the managers or trustees of any hospital for the cure of "the sick or injured, which is now or may hereafter "be established and duly incorporated in any city or "borough of this commonwealth, containing a population "of not less than twenty thousand inhabitants, to make "requisitions quarterly upon the commissioners of the "county in which such hospital may be situated, for the "support of said poor patients under treatment in such "hospital as are unable to pay for their treatment," &c. A subsequent section limited the amount to be thus drawn.

In discussing the question of what constitutes a corporate purpose, the Supreme Court of Pennsylvania recognize the validity of an issue of bonds for the purpose of raising money to pay bounties for the purpose of reliev-

ing the people of the municipality from an impending draft by lot into the military service because in such case the purpose is payment in discharge of a duty or obligation *lying upon the municipality* and not a loan or advance for purposes private in their nature, or made in aid of private corporations or parties. But on coming to the question then at bar, the court say: "A law enabling "a private incorporated hospital to make requisitions upon "a county, for the payment of its charges for the support "of patients under treatment, *even though they be paupers*, "is an appropriation of money by the county to the cor- "poration, and comes within the prohibition of the con- "stitution. It is not a payment of any debt incurred by "the county, but is a transfer of the money by operation "of the act of assembly from the treasury of the county "to that of the hospital. *The hospital exercises no muni- "cipal function*, but takes as a private institution by a "mere act of appropriation. It is under no obligation to "open its doors to municipal inspection or visitation, and "can not be controlled or called to an account for the "moneys drawn upon requisition—once paid, the money "is beyond the control of the county. In *Speer* v. "*School Directors*, 14 Wright, 150, care was taken "to distinguish between those necessary governmental "purposes and that proper official disbursement which "are essential to the welfare of society and for which "municipal liability and credit must often be pledged, "*and those purposes, however public in their nature*, "which are administrated by private, and in a legal sense, "irresponsible hands."

So in the case now at bar the Ottawa Manufacturing Co. exercises no municipal functions, and its purposes, however public in their nature, are administered by pri-

vate, and not only in a legal sense, but actually, irresponsible hands.

If a municipality may not pay money to provide for paupers, which it may be under obligation to support, still less has it the power to donate bonds to a private manufacturing corporation, although the latter might give employment to those who would otherwise be dependent upon public charity, or might add to the amount of property taxable by the municipality.

Right here we may suggest what seems to us a complete refutation of the theory that the object of the donation of these bonds is a corporate purpose as much as the payment of bounties to avoid a draft, which was sustained by the Illinois and Pennsylvania cases. Until the draft should be made, the burden to provide a quota of men rested upon the municipality and on its citizens equally, and the burden could more equally be borne by payment of bounties than by selecting certain individuals who should personally discharge the obligations of the municipality; but none of the cases hold that if, by virtue of a draft or otherwise, the burden was resting on a private individual to be enrolled in the military service, a municipality would have the power to tax the community for the benefit of such private person, no obligation resting on the corporation which would thereby be discharged.

In *Livingston County* v. *Neider*, 64 Ill., 432, the Supreme Court said:

"It may be difficult to determine with precision what is "a 'corporate purpose' in the sense of the constitution, "but it is less difficult to decide what is not such a pur- "pose. The true doctrine is, such purposes, and such "only, as are germane to the objects of the creation of the

"municipality, at least such as have a legitimate connec-
"tion with those objects, and a manifest relation thereto.
"A view more liberal and extended than this might in-
"volve these corporations in much embarrassment, invit-
"ing them to prodigal taxation and a lavish expenditure
"of its proceeds in works more fanciful than really pro-
"motive of the best interests of the municipality."

The meaning of the court is not very happily expressed, but there is no doubt what it is. We must look to "the "object of the creation of the municipality."

But in view of *Johnson* v. *The County of Stark*, 24 Ill., page 75, there can be no room for doubt or cavil as to the meaning of the language used by the Supreme Court of Illinois, as to what is, and is not, a corporate purpose, so far as the case at bar is concerned, within the meaning of the fifth section of the ninth article of the Constitution of 1848, which alone could authorize the legislature to empower the city of Ottawa to issue these bonds.

At page 87 of said report, the court use the following language:

"We come now to the consideration of the fifth section of
"the ninth article, upon which the weight of the argument
"in this case, against the constitutionality of this act, was
"based. It is this: 'The corporate authority of counties,
"townships, school districts, cities, towns and villages may be
"vested with power to assess and collect taxes for corporate
"purposes, such taxes to be uniform in respect to persons
"and property, within the jurisdiction of the body compos-
"ing the same. And the general assembly shall require
"that all the property within the limits of municipal corpo-
"rations, belonging to individuals, shall be taxed for the
"payment of debts contracted under authority of law.'
"As before observed, it is urged that the act under consid-

"eration is supposed to be unconstitutional, by defendants "in error, because a tax on the property of individuals in the "county, to meet this indebtedness, follows its creation as a "necessary consequence.

"This constitutional provision is too clear and explicit, in "conferring upon the general assembly power to authorize "the county to levy and collect such a tax, for corporate "purposes, to admit of any question. It then becomes "necessary to ascertain whether the aiding in the construc- "tion of a railroad running through its limits, is such a "county purpose as authorizes the legislature to confer "upon it that power.

"That the public at large, the individual shareholders "of the company, and the citizens of the county, all have "an interest in the construction of such a road, is too plain "to admit of any doubt. By its completion, the public "have increased facilities for travel and transportation, the "shareholders the prospect of profit on their investment, "and the citizens of the county have afforded to them in- "creased facilities for trade and commerce, enhanced value "to property within their local division, with the more "speedy development of their agricultural and other re- "sources.

"The citizens of the county, while they enjoy advantages "common to the public at large, have other and more im- "portant benefits resulting from its construction.

"In the completion of these improvements, the whole "community is either immediately or remotely interested, "those near the line on which it passes, in a larger, and "those more remotely situated, in a less degree. But all "participate in its benefits.

"In the affairs of life, public and private interests are so

"closely blended, that it is difficult to draw the line sepa-
"rating, in all cases, the one from the other. Numerous
"cases may be given, fully illustrating each, but the es-
"tablishment of any rule by which each may be distin-
"guished from the other, is, perhaps, impracticable.

"*All will perceive that the building of court houses, jails,*
"*poor houses, the opening and keeping in repair of com-*
"*mon highways, and the erection and maintenance of*
"*bridges by which they are rendered useful to the people,*
"*are 'county purposes,' for which the people of the county*
"*may be taxed.*

"*And that the erection of hotels, mercantile, manufactur-*
"*ing, trading and banking houses, although of great im-*
"*portance to the prosperity of the community, are not such*
"*purposes as were contemplated by the framers of the con-*
"*stitution. These are properly regarded as matters of in-*
"*dividual enterprise, and cannot, in any reasonable or just*
"*sense, be regarded as public or county purposes.*"

No language could be more emphatic.

No illustrations could be more apt. It is axiomatic, they say, that the building of court houses, jails, and the keeping of highways in repair, are corporate purposes within the meaning of the constitution, for which the people may be taxed. And equally self-evident that the building of hotels, the creating of manufacturing establishments, are not such corporate purposes as were contemplated by the framers of the constitution, and neither could the municipality levy a tax (and consequently issue no bonds) to invest in the same, nor could the legislature empower it to do so. Such purposes are not corporate, and consequently *ultra vires*. What is the present donation of bonds for? To a private individual,

to aid a private corporation, to create a water power for its own sole use for *manufacturing* purposes. It expressly falls within the language of the Supreme Court, and was prohibited by the constitution of Illinois.

In *Ohio Valley Iron Works* v. *Moundsville*, 11 West Va., 1, the facts were that the town, having a general authority to issue bonds for corporate purposes, had passed an ordinance, which had been ratified by the vote of the citizens, donating $10,000 in bonds to the Iron Works, and the bonds delivered. A *mandamus nisi*, to compel the levy of a tax to pay the interest upon the bonds, was issued. The petition alleged that the works of petitioner were located by it within the corporate limits of Moundsville relying upon the inducement of the contract of the town to make such donation, and that relying upon said agreement, it had made extensive improvements, which had generally promoted the material interests of said town, and the inhabitants thereof.

The return traversed none of the facts alleged in the petition, but presented in substance only questions of law, and the main question on hearing was the legality of the issue of the bonds.

The court, in its opinion, cite only the case of *Loan Association* v. *Topeka*, and proceed as follows:

"In the case before us it is conceded, and the record "shows, that the donation of the bonds to the company "are without consideration, that they were in aid of pri- "vate enterprise solely, that the town had no stock or "other interest in the company, received none of the "profits, had no control over its affairs, but had volun- "tarily made a gratuitous donation of the bonds which "were expected to be paid by taxation. I am satisfied "that such a transaction was not within the meaning of

"the legislative act relied on, but was contrary to the "spirit of the constitution, *and to the fundamental principles* "*of private rights*, and that said bonds are illegal, null "and void."

The relations of the donor and donee, in the foregoing case, seem to have been like those in the case at bar.

In *Bissell* v. *City of Kankakee*, 64 Ill., 251, the court said, in reference to certain bonds issued by the city of Kankakee:

"This was not a borrowing of money for municipal "purposes, or the payment of any indebtedness, but sim- "ply a donation to 'The Douglas Linen Company,' to en- "able it to embark in the manufacture of linen fabrics in "that city. The legislature had never conferred upon that "city any power to make donations for such purposes. "It was held in *Trustees, etc.*, v. *McConnel*, 12 Ill., 138, "that a municipal corporation, being a mere creature of "the law, can only exercise such powers as are conferred "upon it by the act creating it. Manifestly, therefore, the "acts of the officers of the city of Kankakee in issuing "the bonds for the purpose of making a mere donation "to 'The Douglas Linen Company,' were *ultra vires*. No "warrant for their action can be found in the city charter, "or in any act of the legislature.

"This is not a case where there has been an irregular or "defective execution of a power in issuing bonds by a cor- "poration having lawful authority to do so, but here there "is a total want of authority, and hence the bonds are ab- "solutely void." Citing:

Marshall Co. v. *Cook*, 38 Ill., 44.
Schuyler Co. v. *The People*, 25 Ill., 181.
Clarke v. *Supervisors, etc.*, 27 Ill., 305.

In *English* v. *The People*, 96 Ill., 569, this decision was re-affirmed.

The court said: "No attempt was made to show that "this item falls within any class for which the city might "lawfully levy taxes. On the contrary, parol evidence "was introduced by the plaintiff in error showing, with "reasonable certainty, that the objection is well taken— "that it is a tax for the payment of the principal and in- "terest of bonds issued in aid of a private manufacturing "corporation.

"In *Bissell et al.* v. *the City of Kankakee*, 64 Ill., 249, "we held that such bonds are void, even in the hands "of an innocent purchaser, and we still adhere to the doc- "trine there announced."

We have always supposed that the case at bar was completely within the principles established in *Loan Association* v. *Topeka*, 20 Wallace, 655. That case was welcomed by the profession as settling the law upon questions of this sort, on safe and stable grounds, and it would be a public calamity if its authority should be disregarded.

In that case the court said:

"To lay with one hand the power of the government "on the property of the citizen, and with the other to be- "stow it upon favored individuals to aid private enter- "prises and build up private fortunes, is none the less a "robbery because it is done under the forms of law, and "is called taxation. This is not legislation. It is a decree "under legislative forms.

* * * * * *

"We have established, we think, beyond cavil, that there "can be no lawful tax which is not laid for *a public pur- "pose*.

"It may not be easy to draw the line in all cases, so as "to decide what is a public purpose in this sense, and "what is not.

"It is undoubtedly the duty of the legislature which im- "poses, or authorizes municipalities to impose a tax, to see "that it is not to be used for purposes of private interest "instead of a public use, and the courts can only be justi- "fied in interposing when a violation of this principle is "clear, and the reason for interference cogent; and in de- "ciding whether, in the given case, the object for which "the taxes are assessed falls upon the one side or the other "of this line, they must be governed mainly by the "course and usage of the government, the objects for "which taxes have been customarily and by long course of "legislation levied, and what objects or purposes have been "considered necessary to the support and for the proper "use of the government, whether state or municipal. "Whatever lawfully pertains to this, and is sanctioned by "time and the acquiescence of the people, may well be held "to belong to the public use, and proper for the mainte- "nance of good government, though this may not be the "only criterion of rightful taxation.

"But in the case before us, in which the towns are au- "thorized to contribute aid by way of taxation to any class "of manufactures, there is no difficulty in holding that "this is not such a public purpose as we have been con- "sidering. If it be said that a benefit results to the lo- "cal public of a town by establishing manufactures, the "same may be said of any other business or pursuit which "employs capital or labor. The merchant, the mechanic, "the innkeeper, the banker, the builder, the steamboat "owner, are equally promoters of the public good, and "equally deserving the aid of the citizens by forced con-

"tributions. No line can be drawn in favor of the man-
"ufacturer which would not open the coffers of the pub-
"lic treasury to the importunities of two-thirds of the busi-
"ness men of the city or town."

In view of the foregoing authorities, it is difficult to see how the bonds in question can be considered as having been issued for a corporate purpose. They were presented to a private corporation as an absolute gift, so far as receiving any property in exchange was concerned. They were given to help the company create a water power which it was to farm out for its own profit, and in which the city was to have no interest. Was this one of the objects in view in creating this municipal corporation? Was it even germane to its objects? If the exercise of this power is permissible, where is the line to be drawn? What species of business enterprise is there in which cities may not embark?

We add a quotation from a very able opinion of the Supreme Court of Massachusetts, in *Lowell* v. *Boston*, 111 Mass., 460. The court said:

"The power to levy taxes is founded on the right, duty
"and responsibility to maintain and administer all the gov-
"ernmental functions of the state, and to provide for the
"public welfare. To justify any exercise of the power re-
"quires that the expenditure which it is intended to meet
"shall be for some public service, or some object which con-
"cerns the public welfare. The promotion of the interests
"of individuals, either in respect of property or business,
"although it may result incidentally in the advancement of
"the public welfare, is, in its essential character, a private
"and not a public object. However certain and great the
"resulting good to the general public, it does not, by reason
"of its comparative importance, cease to be incidental.

"The incidental advantage to the public, or to the state, "which results from the promotion of private interests, "and the prosperity of private enterprises or business, does "not justify their aid by the use of public money raised by "taxation, or for which taxation may become necessary.

"It is the essential character of the direct object of the "expenditure which must determine its validity, as justi- "fying a tax, and not the magnitude of the interests to be "affected, nor the degree to which the general advantage "of the community, and thus the public welfare, may be "ultimately benefited by their promotion."

In *People* v. *Batcheller*, 53 N.Y., 143, GROVER (Justice) delivering the opinion of the court, said:

"I think it would not be claimed that a town could "be compelled to become a stockholder in a banking or "manufacturing corporation, although it appeared that "the particular corporation would largely promote the "public interest where the business was conducted."

We might add indefinitely to these quotations, but it is unnecessary. Numerous cases to the same purport are cited in Jones on Railroad Securities, Sec. 123, *et seq.*

We submit, that the bonds in question, having been issued as a donation to aid a private corporation in a private enterprise, are void in the hands of a holder with notice.

III.

We now come to the third proposition, as follows:

IF THE PURPOSE FOR WHICH THESE BONDS WERE ISSUED CAN BE CONSIDERED A CORPORATE PURPOSE, THE BONDS, IN ORDER TO BE VALID, SHOULD HAVE BEEN ISSUED BY AUTHORITY OF THE BOARD OF COMMISSIONERS SPECIALLY APPOINTED BY THE LEGISLATURE TO TAKE CHARGE OF THIS WHOLE MATTER, TO SUBSCRIBE THE STOCK AND TO ISSUE AND SELL AT PAR THE BONDS OF THE CITY TO RAISE THE MONEY FOR ITS PAYMENT.

We consider each of our five propositions decisive of this case, but the one just stated seems to us too clear to admit of doubt. We have denied, under our last head, the power of the legislature to authorize the city of Ottawa to issue these bonds, because, we claim, they were issued for a purpose not corporate, and this the legislature of Illinois has no power to authorize. But, if the purpose had been corporate, and the legislature had had the constitutional power to authorize their issue, it has clearly done so, and the mode and conditions prescribed by it must be followed.

What were they?

On the 15th of February, 1851, as set forth in our preliminary statement, the legislature passed an act incorporating William H. W. Cushman and certain other persons mentioned in the act, into a company, under the name of the "Ottawa Manufacturing Company," for the purpose of building a dam across Fox river, and doing such other work as might be necessary to create a water power at Ottawa.

On the 16th day of February, 1865, the legislature

passed another act, amending the first, and authorizing the company created by the first act to build a dam across the Illinois river, as well as the Fox, for the purposes specified in the first act.

On the 11th of February, 1867, the legislature passed another act, entitled: "An act to authorize the city of "Ottawa to subscribe to the stock of the Ottawa Manu- "facturing Company."

This act was, of course, an amendment of the city charter. It would not be pretended that the city could subscribe for this stock without the special authority of the legislature. It would be absurd to say it could subscribe under its general powers. But even if it could have done so, the legislature having acted upon and taken jurisdiction of the subject, and prescribed the manner and conditions of subscribing to the stock, and of issuing the bonds therefor, it cannot be claimed that the city could proceed, except in conformity with the statute.

Neither can any one have the hardihood to claim, that because the legislature had given the power to subscribe to the stock of the Ottawa Manufacturing Company, and issue its bonds to raise the money for payment, it could issue them without reference to the conditions of this act, and make a donation of them to this same company.

The legislature had spoken, and had prescribed how the city might aid in promoting the objects of the company. It might sell its bonds at par to the amount of $100,000, and invest the money in the company's stock. This certainly did not give it power to issue its bonds, and donate them to the company, without receiving stock in exchange.

The act in question created five persons named therein

a board of commissioners, who were to appoint a president, secretary and treasurer. In case of a vacancy in their body, the circuit court was to fill it. The board was authorized to subscribe $100,000, to the stock of the Ottawa Manufacturing Company, and when fully paid for, to receive and hold it on behalf of the city. In order to raise the money to pay for the stock, they were "authorized for and on behalf of said city, to make, exe- "cute and dispose of bonds of the same to the amount of "one hundred thousand dollars, payable in not less than "ten years," and the act further provided that "such "bonds shall not be disposed of by said commissioners "for less than their par value."

These were the modes and conditions upon which the city of Ottawa could issue its bonds for the purpose of creating a water power.

Now, what did the city in fact do? The finding of the court shows.

On the 11th of May, 1869, the city council adopted a resolution requesting the board of commissioners, which had been duly organized, to subscribe for the stock. This the board did not do, for what reasons does not appear, but probably because it regarded the scheme as wholly chimerical, and the authority of the board was discretionary. The commissioners declining to subscribe to the stock or issue the bonds, the mayor and clerk, on the 2d of August following, issued the bonds without securing any stock in exchange, and the court finds the bonds were never placed in the hands of the commissioners, but were delivered to Cushman for the company, and the commissioners never consented to their issue, nor in any manner had any connection therewith.

The bonds were therefore issued by a branch of the

city government, having no authority to issue them, without the consent of that part of the city authorities which alone had the power to issue them, and without obtaining the consideration which was to be the condition of their issue. It was an extraordinary assumption of power on the part of the city council—the directing by ordinance, the mayor and clerk to issue these bonds to Cushman to be used in creating a water-power "under the franchises "and powers which have been granted for that purpose "by the legislature," when it was known to all of them that the entire authority in that matter had been entrusted to a board of commissioners, and the council had actually appointed a committee to request that board to act.

In this case there was actual notice. The bonds were handed over by the city to Cushman, one of the directors of the manufacturing company, and sold by the company to Eames, a citizen of Ottawa, who bought, as the court finds, with knowledge of all the facts, and by Eames sold to the present plaintiff after maturity, and with knowledge on his part, also, of all the facts.

Every one of the parties who has dealt in the bonds involved in this suit knew that the board of commissioners was vested with exclusive power over the issue of the bonds, that they had declined to issue them, and that the bonds were, in fact, issued by a portion of the city government that had no more power to issue them than had the city constable.

The power to issue those bonds was given to the board of commissioners, and given to them only for the purpose of raising money to pay for stock.

The bonds were in fact issued by the mayor and clerk on the authority of the common council, without the con-

sent of the commissioners, and not issued to raise money for the payment of the stock.

In *Middleport* v. *Ætna Life Insurance Company*, 82 Ill., 565, the court said:

"Where one mode of payment of municipal indebted-"ness is fixed by statute, by implication it excludes all "others. The electors gave their consent to the statu-"tory mode of paying the appropriation voted, viz: by "taxation, and none other, and the corporate authorities "of the town were not at liberty to adopt any other "mode."

In *Supervisors* v. *People, ex rel.* R. I. & A. R. R. Co., 25 Ill., 181, the facts were as follows: a general law of Illinois passsed in 1849, placed the control of such county matters as the issuing of bonds in the county court; in 1850 the county of Schuyler adopted the township organization law, which law was in 1851 amended by transferring the control of county affairs, in counties under township organization, from the county court to the board of supervisors. The effect of this act was to authorize boards of supervisors to call elections, and issue bonds in cases where the power had theretofore been lodged in the county court. *Prettyman* v. *Supervisors*, 19 Ill., 406. In 1855 an act passed the legislature of Illinois authorizing the county to subscribe for stock of the relator and issue bonds therefor, the language of the act providing the mode, being as follows: "And each of said counties "are hereby authorized in the premises to, by their "county court, as fully act as individuals might or could "do; each of said counties shall, and it is hereby made "the duty of the county court of each of said counties, "to order an election to be held," &c. * * * "If a "majority of votes cast are in favor of stock as aforesaid,

"it shall be the duty of the county court to subscribe "for stock," &c.

The pivotal question in the case was whether the board of supervisors, under an election called by them, at which there was a majority in favor of the subscription, had power to issue the bonds, and the Supreme Court of Illinois refused a mandamus to compel the issue by the board of supervisors of bonds to the amount of $16,000, although the board had prior thereto issued bonds to the amount of $69,000, the total subscription having been $75,000.

And in the case of *Schuyler Co.* v. *Farwell*, heard with the foregoing, and which was a suit on coupons of some of the bonds already issued, it was decided that the bonds were void in the hands of third parties:

The language of the court is as follows:

"Now, all the acts required by both these laws to be "done by the county court were performed by the board "of supervisors, and the county court has taken no part "in them, and the important question arises, are they bind- "ing upon the county? We see no way of avoiding the "conclusion that they are not.

"In the case of *Prettyman* v. *Supervisors of Tazewell* "*County*, 19 Ill., 406, a law passed in 1849, authorized "the county court to do similar acts, and we held "that the township organization law, subsequently "passed, transferred the power from the county court "to the board of supervisors, and that consequently "the county was bound by the acts thus performed "by the board of supervisors. But here, the legislature "knowing, as we are bound to presume, that the county "had adopted township organization, and that there was

"a board of supervisors in the county, which by the gen-
"eral law, was vested with general jurisdiction over all
"county matters, and particularly all financial matters,
"saw proper, for some reason which we are unable to
"divine, to confer this power upon the county court,
"instead, as we should suppose, of the more appro-
"priate tribunal, the board of supervisors. There has
"been no subsequent law giving the least color
"to say that the power has been transferred from
"the county court, where it was expressly vested, to the
"board of supervisors. These bonds were, then, executed
"by the chairman of the board of supervisors, without
"the least shadow of authority. As well might the
"sheriff of the county, or the circuit court, have under-
"taken to perform these acts, and execute these bonds, as
"this board of supervisors. There was a total want of
"authority, and the acts were consequently void. Nor
"can we compel the defendants to go on and do further
"void acts by issuing more bonds, or paying interest on
"those already issued."

We also quote from *Gaddis* v. *Richland County*, 92 Ill., 123, as follows:

"The elections having been called and held under the
"direction of the board of supervisors, and not by the county
"court, an act of the general assembly was adopted on the
"9th of April, 1869, to cure irregularities in these elections
"and to render valid the steps taken to make the subscrip-
"tion and to issue the bonds.

"Section 3 of that act (Priv. Laws, Vol. 3, p. 360), pro-
"vides, 'that all elections held for the purpose of voting
"said stock, and the manner in which stock was voted, are
"hereby legalized in all respects, and said stock to be sub-
"scribed in the manner the same was voted.' This is the

"provision which is claimed to be repugnant to the consti-
"tution.

"All will concede, that a municipality can only exercise
"the powers conferred by the charter of their organization,
"and such powers must be by express grant, or such as
"follow by reasonable implication as necessary to perform
"duties imposed or privileges conferred, and the means of
"their accomplishment are not specified. This being a
"fundamental rule, it follows that the power to create a
"debt by a county, or to subscribe to stock in a railroad,
"or to issue bonds to raise money to aid in its construction,
"must be conferred by grant from the law-making power,
"and when the grant is made and the power is conferred,
"it must be substantially pursued. If a particular mode is
"prescribed, the municipality cannot adopt a different mode,
"and if the power is conferred on one set of officials or
"individuals, it cannot act through or by a different set of
"officials or persons. The municipality have no discretion
"in executing the power, nor can they adopt a mode they
"deem better adapted to accomplish the end. The general
"assembly had the power to confer the authority or to
"withhold it, or, in conferring it, to impose such terms and
"conditions as they chose. It was an exercise of power
"by them in the government of the state, and that body
"were the sole judges as to the manner in which the power
"should be exercised, and the functionaries or individuals
"who should exercise it.

"In this case the general assembly conferred the power
"on the county court, and we must presume when the
"power was granted the general assembly knew that this
"county was under township organization, and had a board
"of supervisors as well as a county court, and knowing that
"fact, we must conclude that body, for reasons satisfactory

"to themselves, intended to confer the power on the county "court, and not on the board of supervisors. But if not ap- "prised of the fact we cannot say that, had it been known, "the enactment would have been different. The expression "of one thing or one mode of action in an enactment is usu- "ally held to be an exclusion of all other things or modes. "The language is plain and unambiguous when it says the "county court may call an election, subscribe for stock of "the road, and issue bonds as directed. The language "neither requires nor admits of interpretation. No one can "be in any, the least doubt of its meaning.

"The power, then, having been conferred on the county "court, it could alone act in carrying out the power. No "other functionary, body or indiviual, could act simply for "the want of power. See *Schuyler County* v. *The People*, "25 Ill., 181; *Marshall County* v. *Cook*, 38 id., 45; *Clarke* "v. *Board of Supervisors*, 27 id., 305; *Force* v. *Town of* "*Batavia*, 61 id., 99, and *Harding* v. *Rockford, Rock Is-* "*land and St. Louis Railroad Co.*, 65 id., 90. The first of "these cases is in point, as the material facts of the two "cases are similar and not distinguishable.

"In the case of *Marshall County* v. *Cook*, *supra*, the "county court acted in ordering the election when the "power was vested in the board of supervisors. There, after "the election had been held, the board then acted, and the "bonds were issued under and in pursuance of an order of "the board, and it was held that the county court had no "power to call the election, and the bonds thus issued were "void. From the rule announced in these cases the "bonds were issued without authority, and hence were "void.

"It is, however, urged that there was in this case not a "want of power, but a defective execution of the power

"by the board. That body acted without power—they "had no power to execute. Had the county court, which "possessed the power, acted, and omitted to perform some "specified act or duty, then there would have been power "under which the county court was acting, but by reason "of the omission it would be defectively executed. But "here the board of supervisors had no power to execute, "defectively or otherwise.

* * * * * * *

"It is, however, urged that the bonds were nogotiated "before due, to innocent persons, without notice, and they "should be protected. As a general rule no person can "acquire rights under a void instrument. Such is the case "with forged paper and paper issued without authority.

"Then as these bonds were issued without authority, "and void, the purchaser acquired no rights under them.

"Again, the bonds on their face referred to the charter, "the amendment thereto, and the curative act, by their "dates. Had the purchaser turned to the acts he would "have found that the county court alone had power to act "under the law, and the bonds offered to him were issued "without authority.

* * * * * * * *

"The bond itself referred him to the source of power, "and he only had to turn to the law to see that the board "of supervisors had no power to act in the premises. The "bond being unauthorized and void, the county is not liable "unless rendered so by the act of April 9, 1869, which pur-"ports,as we have seen,to render those void elections valid."

The proper test of the validity of these bonds in the hands of a purchaser with knowledge of all the facts, which is the case here, is to enquire whether or not *man-*

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damus would lie to compel their issue to Cushman by virtue of the proceedings had by the city council, and for the purpose, and in the manner, for and in which they were issued.

We do not think it needs further argument to convince Your Honors that no court would issue a peremptory writ to that effect.

We respectfully submit to Your Honors that on the foregoing considerations and authorities the statement that these bonds are void in the hands of Carey, who occupies the position of a holder with *actual* notice of all the facts, seems as plain as any legal proposition can be which has not yet been decided.

By our brief in the case of *City of Ottawa* v. *Bank of Portsmouth*, tried at the same time, and brought to this court with this case, we have submitted that cause upon the first and third points of this argument. Inasmuch as the finding of the court in that case was that the Bank was a purchaser, without *actual* notice, we now propose to show, if in our power, that it was chargeable with *constructive* notice which would equally lead to a reversal of the judgment. In that view, we ask the attention of the court to the following additional considerations as bearing upon the Bank case:

We suppose it may be urged, on behalf of defendant in error in the Bank case, that the decision of this court, in *Hackett* v. *Ottawa*, 9 Otto, is conclusive of this question, so far as the Bank is concerned.

We think there is a distinction to be observed between the cases in fact, and also desire to call attention to one or two points in the Hackett case which do not, in our opinion, agree with those in the Bank case.

The Hackett case, which was a suit on coupons only, was before this court on an issue of law raised by plaintiff's demurrer to a special plea setting up the acts of the legislature of Illinois of 1851 and 1865, and the two ordinances of the city of Ottawa, which appear here in the findings of fact.

The existence and effect of the act of February 19, 1867, creating the board of commissioners, which is the subject of this portion of our argument, were not presented to or considered by this court in the Hackett case, nor did that record contain the contract between Cushman and the city.

This act was either a public act or, if not such strictly speaking, it was an amendment to the charter of the city of Ottawa.

If a public act, every purchaser, however innocent in fact, is chargeable with notice of all it contains.

If it was merely an amendment to the charter, every purchaser is still bound to take notice of it, because he must in all cases look to the source of authority and ascertain that it is valid; nor can a person be allowed to say that he took notice of a part of the document or charter, but not of all of it, and thus protect himself from the consequences of a complete and fair examination of the whole.

Or, here, a purchaser can not say, "I took notice that "the charter of the city empowered it to issue "bonds for corporate purposes generally by virtue of "Art. 5, Sec. 3 of its charter, but did not take notice of "the amendment of the charter of February 19, 1867." It is the charter of the city as a whole, and not piece-meal, which is the source of authority to which a purchaser

must look. Hence we insist, that here the Bank knew, or was bound to know, that neither by virtue of any acts of the city council, or of the mayor or clerk, nor by a vote of the people, could bonds be authorized to be issued for the purpose to which those in question were devoted, but only by the board of commissioners, who were, by the amendment to the city charter, vested with the sole discretion of deciding upon an issue, and the making and issuing of such bonds.

In view of the cases of *Supervisors* v. *The People ex rel.*, &c., 25 Ill., and *Gaddis* v. *Richland County*, 92 Ill., above referred to, any policeman or fish inspector of the city of Ottawa would have equal authority with the mayor, clerk or common council in making and issuing these bonds, which is, none at all.

Having established that the Bank was bound by the provisions of this act of February 19, 1867, just as much as if its officer, who purchased these bonds, had actually read the act before doing so, we do not wish to be understood as claiming that we have thereby established a complete defense to the suit of the Bank; for it will probably be replied, and we think fairly, that while it is true that the Bank is bound to know that any bonds of the city of Ottawa which are to be issued in aid of the Ottawa Manufacturing Company can only be issued by the board of commissioners, it also is true that there yet remains authority in the city council, with the concurrence of a majority vote of the people, to issue bonds for corporate purposes generally; and it is requisite that it should appear that the Bank is chargeable with implied notice, or put upon inquiry, of the fact that these bonds were issued with some reference to the Ottawa Manufacturing Company.

In the *Hackett* case this court said:

"Had the bonds upon their face made no reference "whatever to the charter of the city, or recited only these "provisions which empowered the council to borrow mon- "ey upon the credit of the city and to issue bonds there- "for, the liability of the city to him could not be ques- "tioned."

This rule we in nowise disent from or question; but that is not the condition of the face of these bonds, which recite on their face that they are issued by virtue of Art. 5, Sec. 3, of the charter of the city, "and also in "accordance with a certain ordinance passed by the city "council of said city on the 15th day of June, A. D. 1869, "entitled 'An ordinance to provide for a loan for munici- "pal purposes,' * * * and in conformity with an "ordinance passed by the city council of said city, on the "30th day of July, A. D. 1869, entitled, 'An ordinance "to carry into effect the ordinance of June 15, 1869, en- "titled, "An ordinance to provide for a loan for municipal "purposes."'"

The effect of these recitals is to some extent passed upon in the *Hackett* case, where it was claimed on behalf of the city of Ottawa, that the purchaser was chargeable with notice of the contents of the ordinances themselves, and it was assumed in the argument that there was no question but that a reference to the ordinance would disclose facts that would destroy any claim of innocence by a purchaser.

The question of the effect of these recitals seems to have been considered in different phases in the Hackett case. In one aspect, they are treated as a declaration by the city that the two ordinances did, *in fact*, provide for a loan for municipal purposes, whereby the city was estopped

from claiming any benefit which it would have been entitled to by an inspection on the part of the purchaser of the ordinances themselves. For the opinion states that: "The bonds in suit, by their recitals of the titles of the "ordinances under which they were issued, in effect, "assured the purchaser that they were to be used for "*municipal* purposes, with the previous condition, duly "given, of a majority of the legal voters of the city."

We respectfully suggest that, as in another portion of the opinion the court considered the effect of a knowledge of the contents of the ordinances upon a purchaser, and held that he would still be protected as a *bona fide* holder, this latter ground must be regarded as the ultimate basis of decision, and leaves us free to re-examine the question of estoppel as being somewhat *obiter*.

It seems to us that the effect of a bond merely reciting, in general terms, that it is issued pursuant to powers vested in the corporation must differ from that of one which makes *special reference* to ordinances authorizing and disposing of the bonds; else no effect can be given to such references, and as no question can be raised upon such general recital, the natural deduction would be that a special reference to ordinances providing for or disposing of the bonds, but which does not purport to be a statement of the legal effect, or a summary of the ordinances, must be held to refer a purchaser to the ordinances themselves, and charge him with knowlege of whatever they contain.

Do these bonds recite upon their face that "they were "to be used for municipal purposes?"

The only basis for an affirmative answer lies in the *title* of the ordinance of June 15, which is also quoted in the *title* of that of July 30. But there is nothing in the bond

which declares what were the actual provisions and purposes of these ordinances, nor that the ordinances did, *in fact*, provide for a loan and make disposition of it, *in fact*, for municipal purposes. They merely afford an index to the source of information where a person could ascertain whether their issue was authorized, and to what purpose they were devoted. It is as if in regard to the election the bonds had recited that an election had been had *without stating the result*. The charter limiting the issue of bonds to such as were sanctioned by popular vote, must not a purchaser who has not the statement of the city that the result was favorable, either ascertain what it really was or take the bonds at his peril? And the charter of the city containing lawful authority to issue bonds to be used only for corporate purposes, must not a purchaser who takes a bond which gives him the date and title only of the ordinance which disposes of the bonds but does not state what the disposition actually is, inform himself whether the ordinance devotes them to a corporate purpose or take them at his peril? And why is a recital of the date and title of an ordinance, which is necessary to refer a person to the proper source of information without chance for mistake, any more the declaration of the legal effect of the ordinance than is the recital that an election was held on a certain day, the same thing as a canvass of the votes polled?

It is a general rule that effect is to be given, if possible to all parts of a written instrument, and an intent is presupposed in the insertion of every recital or provision. In treating the recital of the title of these ordinances as an estoppel the presupposed intent must be that that of July 30 was inserted because that ordinance was a necessary supplement to that of June 15 before the bonds could be

issued; and that therefore the recital of the title of that ordinance was a recital of the authorization by the city council of the issue of the bonds.

But reference to the ordinances shows that that of June 15 needed no supplementary action of the city council to give it operative effect, as in it is to be found ample authority to issue the bonds in the event of the result of the election being favorable. Then there must have been some object in inserting in the bond the title and date of the ordinance of July 30. As it was not necessary to a recital that the city authorities had power to *issue* the bonds, (which were covered by the ordinance of June 15), no effect can be given to it unless it is supposed to have been intended as a reference to the ordinance itself, to which a purchaser should look.

As the estoppel here claimed by a bondholder is not sought to be based upon negligence, or an omission of the city to speak, but on what it has stated—an active rather than a passive estoppel—the language is to be construed, and its meaning fixed, not alone with reference to the position or mental condition of a purchaser, but having in view the situation of the city and all the attendant circumstances. If the city intended to deceive a purchaser by inducing a belief by the recital of these titles, that these bonds were legally issued, it would have mentioned only that of June 15, which was sufficient to authorize the bonds, and an examination of which might be held insufficient notice of invalidity; but when it added the title of that of July 30, it could only have been with a view of giving a *complete* reference to the legislative action, on the part of the city, having reference to these bonds, so that a purchaser might determine upon their legality for himself.

We understand the rule to be that where a person is directed to the source of information, it is equivalent to giving him the information which he may there obtain; and that if the information is in shape of a document or record, and he is told where it is lodged and given the means of finding and identifying it, he is chargeable with notice of its entire contents.

A person buying a tract of land which is occupied is chargeable with notice not only of the fact of possession, but of the extent and nature of the claim or title of the one so in possession.

So if one takes a note made by one whose power is limited, as an agent, by a written instrument of which the payee is aware, to make notes for certain purposes, the latter is bound to see that the act is within the authority; only here the party making the paper under limited authority is a corporation and refers on the paper itself to the ordinance denoting the purpose for which it is issued and by reference to which the purchaser can see if the party had power to make it, or it is void for want of authority.

In *Brush* v. *Ware*, 15 Pet., 93, one Hockaday had a "military right" entitling him to four thousand acres of land; dying, he left a will disposing of his personal estate only and appointing Ware his executor, who assigned the certificate of military right to one Ladd, who obtained warrants thereon on which lands were entered, which passed by mesne conveyances to purchasers for value and without actual notice, and who made this a defense in suit brought by Hockaday's heirs. In passing on this part of the case, this court spoke as follows:

"The warrant then showed the purchaser that this "right, which pertained to the realty, and which, on the

"death of Hockaday, descended to his heirs, had been as-
"signed by the executor. Was not this notice? Was it
"not a fact essentially connected with the title purchased
"by the defendant, which should have put him upon in-
"quiry? If it would do this it was notice; for whatever
"shall put a prudent man on inquiry is sufficient. And
"this rule is founded on sound reason, as well as law.
"How can an individual claim as an innocent purchaser,
"under such a circumstance?

"But it is argued that it would impose on the defend-
"ant an unreasonable duty, to hold that he was bound
"not only to examine the warrant in the land-office in
"Kentucky, but to hunt up the will of Hockaday, and see
"what powers it conferred on the executor.

"The law requires reasonable diligence in a purchaser
"to ascertain any defect of title. But when such defect
"is brought to his knowledge, no inconvenience will ex-
"cuse him from the utmost scrutiny. He is a voluntary
"purchaser; and having notice of a fact which casts doubt
"upon the validity of his title, are the rights of innocent
"persons to be prejudiced through his negligence?

"The will of Hockaday was proved the 11th day of
"July 1799, before the County court of New Kent, in
"Virginia, and recorded in the proper records of that
"county. When the defendant purchased the title he
"knew that it originated in Virginia, had been sanctioned
"by the executive council of that state, and that the war-
"rant had been issued by the register at Richmond.
"These are matters of public law, and consequently known
"to all. But, independently of this, every purchaser of a
"military title cannot but have a general knowledge of its
"history.

"Why was not the defendant bound to search for the

"will? The answer given is, the distance was too great, "and the place where the will could be found was not "stated in the warrant, or on any of the other papers. "That mere distance shall excuse inquiry in such a case "would be a new principle in the law of notice."

The mere title of a law has never been held, as far as we are aware, to usurp the place of the body of the statute, and the rule is that where a bond recites or refers to the statute, under which it purports to be issued, the purchaser is bound to take notice of the statute and all its requirements.

To quote from authority, this court said, in *McClure* v. *Township of Oxford*, 4 Otto, 432: "every dealer in mu- "nicipal bonds which, upon their face, refer to the statute "under which they were issued, is bound to take notice "of the statute and all its requirements."

And the Supreme Court of Illinois said, in *Gaddis* v. *Richland County*, 62 Ills., 123:

"It is, however, urged that the bonds were negotiated "before due, to innocent persons without notice, and they "should be protected." * * * *

"Again, the bonds on their face referred to the charter, "the amendment thereto, and the curative act, by their "dates. Had he turned to the acts, he would have found "that the county court alone had power to act under the "law, and the bonds offered to him were issued without "authority. * * * * *

"The bond itself referred him to the source of power, "and he had only to turn to the law to see that the board "of supervisors had no power to act in the premises."

That is, as we understand, it is the rule of this court, and also of the highest court of Illinois, and so the *lex loci*

contractus, that the purchaser of a bond has not the right to rely upon the *title* of the enactment pursuant to which the bonds purport to have been issued, but that such recital of titles *is a reference to the enactments themselves* which the purchaser must look to; and hence it makes no difference what inference might be drawn from the title itself.

That is all we contend for here. We admit that if the bonds had contained a recital, distinct from the quotation of the *title* of the ordinances, that they were issued for municipal purposes or that the ordinance of July 30 did, in fact, devote them to a corporate purpose, then the Bank here would be entitled to protection, so far as this point is concerned; but we fail to see, in view of the two cases last referred to, that the mention of the titles of the ordinances is a declaration of the contents of the ordinances themselves, or anything more than an index or reference to them.

We do not understand it to have been decided in the Hackett case that the holder of the bonds was not chargeable with notice of the contents of the ordinances referred to in the bonds, but that, on the contrary, the rule, as we have stated it, was tacitly recognized, since the court proceeded to discuss the contents of the ordinances, and held that there was nothing in them amounting to notice of want of, or perversion of, authority.

The court, as before stated, also held the quotation of titles to be an estoppel; but if we are correct in our reading of *McClure* v. *Oxford*, and *Gaddis* v. *Richland*, *supra*, and also in supposing that the Hackett case does not overrule these two, and that the references to the titles charge the purchaser with notice of the contents of the ordinances, (the effect of which we will discuss presently), then it fol-

lows that the city is not estopped by the quotation of these titles, for the self-evident reason that *whatever is sufficient to put a person upon inquiry can not, in the nature of things, operate as an estoppel.*

Whatever puts a person upon inquiry arouses him, and it is only that which lulls him to rest that can be treated as an estoppel; the two cannot consist in the same fact. If the city had not made a reference to these ordinances in the bond, it would have been, unquestionably, and according to the Hackett case itself, estopped from claiming that a purchaser should have looked to the ordinances, because it made no reference to them, and he could not determine whether his bonds were issued under those ordinances, even if he should chance to see them; so, too, its position would have been the same if the bonds had referred, by erroneous titles, to other ordinances having no relation to the bonds, for then he would have been led away from the truth; the only remaining course to avoid an estoppel was to refer to the ordinances, and by their proper dates and titles, and so indicate where the truth could be found; to treat this as an estoppel seems to us to rest the doctrine on a wrong basis and make truth its predicate, whereas it can be invoked only to avoid a result that would be a consequence of deceit.

Finally, under this head of the case, and proceeding upon the ground that as the bonds refer to the ordinances, the purchaser is chargeable with notice of their contents, we wish to suggest the effect of notice, or knowledge of the provisions of the ordinances, upon the Bank here.

We do not forget, meantime, that in the Hackett case it is said that "the utmost which the city, in view of the "indefinite language of the ordinances, can claim is that "he had notice that the bonds were issued for the purpose

"of developing the natural resources of the city for man-
"ufacturing purposes — nothing more."

In that part of the argument in the Hackett case upon the point of notice by the bonds themselves, no reference was made to the language of the ordinances themselves, and very little in the discussion of the question of corporate purpose, which accounts for what seems to us a misapprehension of the contents of these enactments, which in this case are set out in full in the findings of fact of the court below.

The ordinance of June 15 contains nothing which could be claimed to be incompatible with a loan for a corporate purpose, aside from the phrase, "to be expended in de-
"veloping the natural advantages of the city for manu-
"facturing purposes," which is the language quoted in the Hackett case, and from which it would seem that the court's attention was only directed to that ordinance, and we have nothing to urge here as to that ordinance. But turning to the enactment of July 30th, we find that, after referring to that of June 15, and stating the result of the election, it provides that the mayor shall deliver the bonds to "William H. W. Cushman, to be used by him in de-
"veloping the *natural resources of the* SURROUNDINGS *of*
"*the city*," and authorizes Cushman to "expend the same
"in the improvement of the water power upon the Illinois
"and Fox rivers, within the city and immediate vicinity
"thereof, *under the franchises and powers which have been*
"*granted for that purpose by the legislature of the State*,
"or which may hereafter be granted for that purpose, in
"the manner which in his judgment shall best secure the
"practical and permanent use of said water power in the
"city and its immediate vicinity."

These excerpts from the ordinance seem to us clearly to

show that the purpose to which the bonds were devoted was not corporate or municipal; but confining ourselves to the question of authority of any but the board of commissioners to act, the question is whether a purchaser knowing, or chargeable with knowledge, of this ordinance would thereby be advised of or put upon inquiry that would develop the fact that bonds for this purpose could only be issued by the board of commissioners created by the act of Feb. 19, 1867.

Your Honors will bear in mind that the bank was bound to take notice of that act, either as a public law or an amendment to and component part of, the city charter; and the act itself provides for the issue of bonds for the purpose named in this ordinance of July 30, and mentions Cushman as one of the original, and first named, corporators, and the ordinance itself also designates Cushman as having the right to exercise, or participate in, the rights and franchises granted to build these dams across the Fox and Illinois rivers, and these franchises are nowhere granted by the legislature of Illinois to any except Cushman and the others named. Whence this ordinance, in connection with the acts of the legislature, the knowledge of which he is estopped to deny, advises a purchaser of these bonds that they were issued in aid of the rights and franchises granted to Cushman and others under the name of the Ottawa Manufacturing Company, and which bonds, in view of the act of Feby. 19, 1867, which he is bound to take notice of, can not be issued by virtue of an ordinance of the city council, ratified by a vote of the people, but only by the board of commissioners, in their discretion, so that here, as in *East Oakland* v. *Skinner*, 4 Otto, 258: "it is not the case of an informality, an irreg-"ularity, fraud, or excess of authority in an *authorized*

"agent. Where there is a total want of authority to issue "the bonds, there can be no such thing as a *bona fide* "holding."

Again, in *South Ottawa* v. *Perkins*, 4 Otto, 21, this "court said: Not only the courts, but individuals, are "bound to know the law, and cannot be received to plead "ignorance of it. The holder of the bonds in question "can claim no indulgence on that score, and can take no "advantage from the allegation, that he is a *bona fide* "purchaser without notice. He would, it is true, be pre-"cluded from doing so on another ground; namely, the "want of any legislative authority in fact in the town to "issue the bonds in question. Want of such authority is "a fatal objection to their validity, no matter under what "circumstances the holder may have obtained them."

This doctrine is also the law of Illinois: "As a gen-"eral rule, no person can acquire rights under a void in-"strument. Such is the case with forged paper and "paper issued without authority."

Gaddis v. *Richland*, 92 Ills., 123.

Our position is not that a purchaser of bonds is bound to see to the application of the purchase money, but that in this case being referred to the ordinance which does appropriate it, he is thereby advised that there is a total want of authority in the city to issue the bonds.

IV.

We now come to our fourth proposition, as follows:

EVEN IF THE BONDS CAN BE CONSIDERED AS HAVING BEEN ISSUED FOR A CORPORATE PURPOSE, AND IF THEY HAD BEEN ISSUED BY THE PROPER AUTHORITIES, NAMELY THE BOARD OF COMMISSIONERS, THEY WOULD STILL BE UNCOLLECTIBLE BY THE PRESENT PLAINTIFF, BECAUSE HE BOUGHT WITH NOTICE THAT THEY WERE ISSUED TO CUSHMAN IN CONSIDERATION OF HIS CONTRACT TO BUILD "A "GOOD AND SUBSTANTIAL DAM ACROSS THE ILLINOIS RIVER "AND THE FOX RIVER, SUFFICIENT TO BRING INTO USE "ALL THE AVAILABLE WATER," AND TO PROTECT THE CITY ON THESE BONDS IN CASE HE DID NOT CREATE THE WATER POWER, WHICH CONTRACT HE WHOLLY FAILED TO PERFORM.

We respectfully ask, had this suit been brought by Cushman, could there be any question as to the right of the city to defend on the ground of want, or failure, of consideration? We presume the court is aware that such a defense is as good against a bond in Illinois as it is against a promissory note.

If there was any consideration at all for these bonds, it was the written agreement given to the city by Cushman for the creation of the water power.

The city ordinance authorizing the issue of the bonds required that Cushman should execute to the mayor his obligation that he would, without unreasonable delay, and by proper appliances, bring into use all the available water of the two rivers at Ottawa, and that he should return the bonds and save the city harmless if the work was not done. Cushman executed such an agreement, in which he stipulated that he would, "without unreason-

"able or unnecessary delay, cause a good and substantial "dam to be constructed across the Illinois river above "the city, sufficient to bring into use all the available wa- "ter of said river at Ottawa, and construct sufficient head "and tail races to make such water power available, * * "and said Cushman also binds himself, his heirs, executors "and administrators, to and with the city, that in case said "work is not performed to the extent of constructing "a dam across the Illinois river, and races to make the "water power thereby created available for practical use, "that he will return said bonds, or the value thereof to "the city, and save and keep harmless the said city from "all losses on account of the same, or on account of the "interest accruing thereon, and in case the work shall be "performed to the extent above indicated, but shall not be "completed by the construction of all the dams and races "heretofore specified, then said Cushman shall return to "said city a *pro rata* share of said bonds, or of the value "thereof, in proportion that the cost of the work con- "structed shall bear to the cost of that part of the work "not constructed."

The court finds that "the company at once entered up- "on the work of constructing the dams and races, and "partially constructed the same under the powers grant- "ed to it as above set forth, and completed said work so "that some water-power was created, but that said dam "was carried away by a freshet in 1872 or 1873, and has "never been reconstructed."

Here, then, was a failure of consideration.

The contract was, in substance, to create a permanent water-power, by which it was expected the city of Otta- wa would be benefited, and no such power has been cre- ated.

The plaintiff, a purchaser, after maturity, and also with actual notice, stands in the shoes of Cushman, and cannot recover because the consideration has failed. We submit that this objection is fatal, and it is only necessary to bring it to the attention of the court, without further argument.

V.

We now come to our last point.

THE STATUTE AUTHORIZED THE COMMISSIONERS TO SUBSCRIBE TO THE STOCK OF THE MANUFACTURING COMPANY, AND REQUIRED THEM TO "RAISE THE MONEY" FOR PAYMENT OF THE SUBSCRIPTION BY ISSUING AND SELLING BONDS AT NOT LESS THAN PAR. THE MAYOR ISSUED THE BONDS DIRECTLY TO CUSHMAN FOR DELIVERY TO THE MANUFACTURING COMPANY. EVEN IF THE BONDS WERE OTHERWISE FREE FROM EXCEPTION, THIS DISPOSITION OF THEM WAS ILLEGAL, AND AVOIDS THEM IN THE HANDS OF A PURCHASER WITH NOTICE.

This precise question was before this court in *Scipio* v. *Wright*, 101 U. S., 665. There, as here, the statute authorized the town to subscribe to the capital stock of a railroad company, and issue bonds for the purpose of borrowing money to pay for the stock. The town authorities did precisely what was done in this case, except that here the town got no stock. They issued the bonds, and instead of selling them for money, they turned them over to the company in exchange for stock. In our case the city turned over the bonds to the company without even receiving stock in exchange.

But suppose they had received the stock. The transaction would still have been invalid under the authority of

the case cited, because the city made a use of the bonds not authorized by the statute. Here is what this court said:

"The statute prescribed the manner in which the power "it conferred should be exercised. The town was at lib- "erty to subscribe for stock, but if bonds were used to "pay for it, the mode of use was directed to be borrow- "ing money with them and paying the money to the rail- "road company. It is quite conceivable that the purpose "of such a direction, instead of allowing an exchange of "the bonds for the stock taken, was that the railroad com- "pany might obtain an amount of money equal to the "amount of the bonds. This was important to the com- "pany, to the town as a stockholder, and to the public as "interested in the projected railway. If the bonds might be "delivered directly to the company in payment of the stock, "it might sell them at a discount. Thus it would fail to ob- "tain the assistance in building its road, which the legis- "lature contemplated it should have. Its stock would be "practically sold for less than par, and it would not be "worth as much to the town as it would be had all the "money for which the bonds were given come in to the "company's treasury. Whether such were the motives "that induced the peculiar phraseology of the statute or "not, the highest court of New York has repeatedly con- "strued it as prescribing the manner in which the bonds "might be used or issued, and as denying the power "to exchange them directly with the railroad company "for the stock taken by the town.

"These decisions have been constructions of the identi- "cal statute we have now under consideration, and by "which the bonds now in suit are alleged to have been is-

"sued. The construction given by the state court must, "therefore, be our guide.

"*Starin* v. *The Town of Genoa*, (23 N. Y., 439) was a "suit for interest upon the town bonds made under the act. "They had been exchanged with a railroad company for "capital stock taken for the town, and the exchange was "accompanied by the same agreement as that made be- "tween the town and company in the present case. The "plaintiff was a purchaser from the railroad company, "with knowledge that it had received the bonds in pay- "ment of stock. In these respects the case was exactly "like the present. The Court of Appeals ruled that issu- "ing the bonds by exchanging them for the company's "stock was not an execution of the power and authority "granted by the statute, but an appropriation of them in "a manner not contemplated by the legislature or by the "tax-payers' assent. The court said: 'It was evidently "the intention of the act that money should be raised and "paid over to aid in the construction of a railroad, and no "color is given to the idea or position that the credit mere- "ly of any town should be given, through and by which "money might be raised.' They, therefore, held that the "bonds were issued without authority, and as the railroad "company received them on a consideration not author- "ized, it was chargeable with a knowledge of their inva- "lidity, and it never could have enforced them. "It was further ruled that the plaintiff stood "in no better position, that having purchased with "notice of the manner in which they had "been issued, he was not a *bona fide* holder. *Gould* v. "*The Town of Sterling* (23 N. Y., 456), is a similar "case, and the ruling of the court was the same. In *The* "*People* v. *Mead* (24 *Id.*, 114) we find a re-assertion of

"the invalidity of bonds first negotiated by exchanging "them for stock of the railroad company. The opinion "was delivered by DENIO, J. It was, however, said that "a *bona fide* holder, who had no knowledge that the rail- "road company had received the bonds in payment for "the stock taken for the town, would not be liable to the "defense, which existed against the railroad company.

"*Horton* v. *The Town of Thompson* (71 *Id.*, 513) is "another case in which the Court of Appeals gave the "same construction to another similar statute, holding that "bonds exchanged for stock were unlawfully issued, and "that a purchaser with knowledge that they had been "thus issued, could not enforce them.

"It thus appears to be the settled construction given "by the courts of New York to the act under which the "bonds now in suit were issued, and to other similar acts, "that they do not authorize an exchange of bonds for "shares of the capital stock of railroad companies, and "that a purchaser who had notice at the time of his pur- "chase that such a disposition of the bonds was made by "the town officers or railroad commissioners, can not re- "cover in a suit brought upon them."

The parallelism between the two cases is exact, except we have the additional defense that we did not even receive stock for our bonds.

The statute in this case provided the bonds should be sold at not less than par. In fact, they have not been sold at all, but even if stock had been received for them, such disposition of them would have been invalid.

The precise question decided by your Honors in *Scipio* v. *Wright* has not been decided by the Supreme Court of this state. The same principle, however, was asserted

in *Middleport* v. *Ætna Ins. Co.*, 82 Ill., 563, where, quoting from the syllabus of the case, the court held:

"When a law authorizes the donation of money by "a municipal corporation, to aid in the construction of a "railroad, and provides for levying a tax to raise the "amount to be donated, the officers of the corporation "cannot adopt any other mode of paying the same, and "bonds issued by them to the company for the purpose of "paying such indebtedness are void."

VI.

THE JUDGMENT OF THE CIRCUIT COURT WAS ERRONEOUSLY RENDERED, BECAUSE THAT COURT WAS WITHOUT JURISDICTION TO RENDER ANY JUDGMENT ON THE MERITS.

SECTION 1, of the "act to determine the jurisdiction of "the Circuit Courts of the United States," passed March 3rd, 1875, provides as follows: "Nor shall any circuit or "district court have cognizance of any suit founded on "contract in favor of an assignee, unless a suit might "have been prosecuted in such court to recover thereon, "if no assignment had been made, except in case of "promissory notes negotiable by the law merchant and "bills of exchange."

The bonds in suit are payable to "W. H. W. Cushman or bearer," and there are but two ways in which they could be assigned by Cushman, one by indorsement and the other by simple delivery; and but one of these modes would be effectual to vest the assignee with the legal title or ownership. If the court follows the law of Illinois—the *lex loci contractus*, which in this case is also the

lex fori, and agrees with us and counsel for defendant in error, (for in the case of *Garfield* v. *Berry*, 5 Bradwell, 355, he successfully contended for the principle of our first point, upon the authority of *Garvin* v. *Wiswell*, and other cases), that an indorsement is necessary to vest the assignee with the legal title, then the present point is unnecessary to be considered as the judgment must be reversed, and the bonds held subject to all equities; but if this court should be of opinion that the assignee of these bonds, by mere delivery, was thereby vested with the legal title, then we think the defendant in error encounters another horn of a dilemma.

The exception of the statute conferring jurisdiction upon the Circuit court to entertain a suit by an assignee of a contract limits the power to two varieties of instruments, first, *promissory notes* negotiable by the *law merchant;* second, bills of exchange.

Now admitting for argument's sake, that plaintiff below became a *bona fide* assignee of these bonds, and is entitled to protection against latent equities, do the instruments fall within either variety mentioned in the statute?

They have not sufficient resemblance to bills of exchange to justify a comparison.

They surely are not promissory notes negotiable by the law merchant, being under seal. Though, by the statute of Illinois, an assignee of a bond or note under seal may bring suit in his own name, on the instrument, if properly assigned either by indorsement or delivery, according to its form, such right was not conferred by common law or the law merchant which is in force in Illinois by virtue of our adoption of the common law.

Cook v. *Renick*, 19 Ills., 598.

In Parsons on Notes and Bills, Vol. I, Chap. 2, p. 35, in speaking of this class of instruments, it is said:

"If they are sealed, there is more difficulty. If made "payable to order, or to assigns, or to holder or bearer, "they must still, by the general law of specialties, be sued "in the name of the original obligee, or, if in the name of "the holder, then subject to equitable defenses; and only "a new principle, or an important modification of an old "one, would permit them to be sued in the name of the "holder, and would liberate them in his hands from "equitable defenses."

Moreover, the city of Ottawa is by its charter empowered to borrow money and to issue *bonds* therefor, which, by the most ordinary implication, excludes the power to issue other negotiable paper. Even if we were not aided by construction of the charter it would still be questionable whether a municipal, as distinguished from a banking or trading corporation, would have implied power to issue negotiable paper.

"*Banking and trading corporations* have *implied or in-* "*cidental power* to make *negotiable paper;* and the same "rule has, in some of the cases, been applied to munici- "pal corporations. The ordinary warrants of such cor- "porations, it is clear, do not cut off equities, and it is at "least doubtful how far they have the *implied power* to "make paper which shall have this effect. The adjudged "cases on this point are conflicting."

Dillon on Municipal Corporations, § 407.

In support of the view adverse to this implied power, we also refer to *Police Jury* v. *Britton*, 15 Wall., 566, the syllabus of which is as follows:

"The trustees or representative officers of a parish,

"county, or other local jurisdiction, invested with the usual "powers of adminstration in specific matters, and the pow- "er of levying taxes to defray the necessary expenditures "of the jurisdiction, have no implied authority to issue ne- "gotiable securities, payable in future, of such a character "as to be unimpeachable in the hands of *bona fide* holders, "for the purpose of raising money or funding a previous "debt."

When the implied power is thus doubtful in the absence of authority, much more must the latter, when found, be strictly pursued.

Nor can it be said that it was the intent of the legislative power to include in this exception all commercial paper, including bonds, negotiable either by the law merchant or by statute. If such had been the desire it would have been much more simple to say "except in the case "of negotiable instruments," than to use the phrase actually adopted, and it is only legitimate to infer that congress meant what was said and intended to confer jurisdiction in favor of assignees without regard to the citizenship of the obligees only in cases of bills of exchange and of promissory notes negotiable by the law merchant, which by no means include all negotiable paper, or bonds under seal.

Then the present actions cannot be maintained by Carey or the Bank in the Federal court, unless Cushman, named in the bond as payee, could have brought suit in the same court, and if the Federal court could not entertain a suit by him they must seek a forum where he could stand, though their right to claim protection as *bona fide* purchasers for value would in such other court, still be the same as here.

Proceeding on the construction of the statute suggested by us, the record does not show jurisdiction in the Circuit

court, either in pleading or proof, for it nowhere appears that Cushman was a citizen of another State than Illinois, at the time when the bonds were delivered to him, or ever after, so that he could bring suit in the Circuit court. This absence of affirmative showing of jurisdiction is error.

In *Ex parte Watkins*, 3 Pet., 205, this court reaffirmed a former opinion holding that: "The courts of the "United States are all of limited jurisdiction, and their "proceedings are erroneous if the jurisdiction be not "shown upon them." Again, in the same case: "It is "universally understood that the judgments of the courts "of the United States, although their jurisdiction be not "shown in the proceedings, are yet binding on all the "world: and that this apparent want of jurisdiction can "avail the party only on a writ of error."

In *Rhode Island* v. *Mass.*, 12 Pet., 718, this court say in speaking of objection to the jurisdiction: "However late "this objection has been made, or may be made in any "cause, in an inferior or appellate court of the United "States, it must be considered and decided, before any "court can move one further step in the cause."

Finally in that case of *Scott* v. *Sandford*, 19 How., 393, when the question of jurisdiction was raised it was claimed that the respondent had waived it by pleading over in bar after a demurrer had been sustained to a plea in abatement to the jurisdiction of the court. In passing on this question, Chief Justice TANEY said:

"But, in making this objection, we think the peculiar "and limited jurisdiction of courts of the United States "has not been adverted to. This peculiar and limited "jurisdiction has made it necessary, in these courts, to "adopt different rules and principles of pleading, so far "as jurisdiction is concerned, from those which regulate

"courts of common law in England, and in the different "states of the Union which have adopted the common- "law rules."

* * * * * * *

"Hence, when a plaintiff sues in a court of the United "States, it is necessary that he should show, in his plead- "ing, that the suit he brings is within the jurisdiction of "the court, and that he is entitled to sue there, and if he "omits to do this, and should, by any oversight of the "circuit court, obtain a judgment in his favor, the judg- "ment would be reversed in the appellate court for "want of jurisdiction in the court below. The jurisdiction "would not be presumed, as in the case of a common law, "English or state court, unless the contrary appeared. "But the record, when it comes before the appellate "court must show affirmatively, that the inferior court "had authority, under the constitution, to hear and deter- "mine the case. And if the plaintiff claims a right to sue "in a circuit court of the United States, under the pro- "visions of the constitution which give jurisdiction in "controveries between citizens of different states, he must "distinctly aver in his pleading that they are citizens of "different states; and he cannot maintain his suit without "showing that fact in the pleadings."

In the same case Mr. Justice WAYNE, in a separate opinion, speaks as follows:

"But in a case brought to this court, by appeal or by "writ of error from *a circuit court of the United States*, "we begin a review of it, *not by inquiring if this court "has jurisdiction*, but if that court has it. If the case has "been decided by that court upon its merits, but the rec- "ord shows it to be deficient in those averments which "by the law of the United States must be made by the "plaintiff in the action, to give the court jurisdiction of

"his case, we send it back to the court from which it was "brought with directions to be dismissed, though it has "been decided there upon its merits."

Not only does the record not show affirmatively that Cushman was not a citizen of a different State from the maker of these bonds, but it shows that he was a citizen of the city of Ottawa itself, by the agreement between him and the city relating to these identical bonds, which is set out in the findings of fact.

Furthermore, if necessary, he was the leading corporator of the Ottawa Manufacturing Company, to which corporation these bonds were donated; they were made payable to Cushman, who was an officer of the company, on its behalf, and so far as the domicile of a corporation is concerned, we understand it to be the rule of this court, that it will be conclusively presumed that all members of a corporation are citizens of the State creating the corporation, and as Cushman was acting in this matter entirely on behalf of the corporation, it is but fair to apply this presumption to him.

He being a citizen of Illinois, and not being shown or averred to be a citizen of another State, we submit that the judgments recovered below must be reversed for want of jurisdiction to enter them.

We submit to your Honors, that any one of the six propositions we have submitted in this brief, is sufficient to defeat a recovery on these bonds in the Carey case, and that the first, third and sixth are fatal to the judgment in the Bank case.

LAWRENCE, CAMPBELL & LAWRENCE, AND
M. T. MALONEY,
For Plaintiff in Error.

C. B. LAWRENCE,
Of Counsel.

IN THE

UNITED STATES SUPREME COUR

105-110

OCTOBER TERM, A. D. 1881

THE CITY OF OTTAWA, *Plaintiff in Error,*

v.

WILLIAM H. CAREY, *Defendant in Error.*

AND

THE CITY OF OTTAWA, *Plaintiff in Error,*

v.

THE FIRST NATIONAL BANK OF PORTSMOUTH, *Defendant in E*

BRIEF ON PART OF DEFENDANT IN ER

G. S. ELDREDGE,
For Defendant in Error.

CHICAGO

SUPREME COURT U.S.
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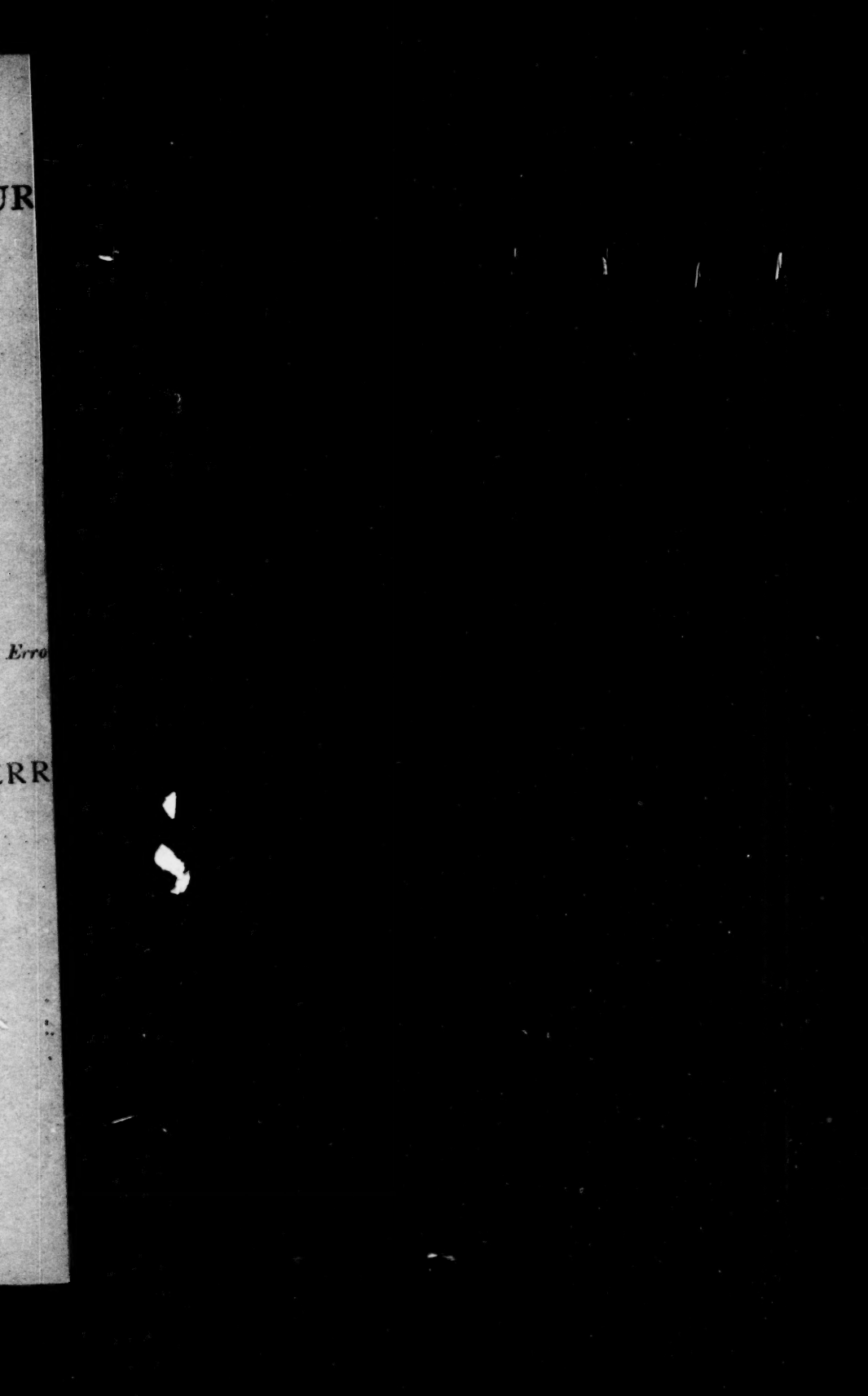

alike. The questions involved in this case embrace those involved in the Portsmouth bank case, and some others. So far as the questions involved in the present case are identical with those in the Portsmouth bank case, the court is respectfully referred to my argument in that case herewith filed. The findings in the two cases are only different in this, that in the Portsmouth bank case the court found that the plaintiff below was a *bona fide* purchaser of the bonds, etc., before maturity, for value, without notice of any actual or alleged defense thereto, and the eleventh, twelfth and thirteenth findings in the pending case are not in the record in the bank case. The court found in favor of the plaintiff below, the sum of $72,814.76.

What is said, therefore, in the Portsmouth bank case, as an introductory statement of facts, need not be here repeated. In addition thereto, the attention of the court is first called to the ordinance of the 15th of June, 1869, entitled "An ordi-"nance to provide for a loan for municipal purposes," which (see Rec. p. 23) provides as follows: "Be it enacted by the "City Council of Ottawa, that the mayor of the city be, and "he is hereby authorized to borrow in the name of the city, "at a rate of interest not exceeding ten per cent., $60,000, "*for the use of said city, to be expended in developing the* "*natural advantages of the city for manufacturing purposes;* "and that bonds of the city be issued therefor in sums of five "hundred dollars, with interest, payable annually, said bonds "to be payable one-third in five years, one-third in ten years, "and one-third in fifteen years after the date thereof; pro-"vided, that no application shall be made of the proceeds of

"said bonds except for the purpose aforesaid, and in pursuance "of an ordinance to be duly passed for that purpose, by the "City Council, nor until the faithful application of the proceeds "of such bonds to the purpose aforesaid shall be secured to "the city." Section 2 provides for the levy of a direct annual tax to be set apart as a separate fund, to be applied to the payment of the interest.

On the 30th of July, 1869, another ordinance was adopted by the City Council, entitled, "An ordinance to carry "into effect the ordinance of June 15th, 1869, entitled 'An 'ordinance to provide for a loan for municipal purposes.'" This last ordinance, after reciting the adoption of the prior one, at an election held on the 20th of July, 1869, by which it was ratified by a majority of 823 votes—being a majority of the legal voters of the city, provides that the bonds of the city to that amount be issued by the mayor, in pursuance of the ordinance of June 15th, and be delivered to William H. W. Cushman, "to be used *by him* in developing the natural resources of the surroundings of the city, and that said Cushman be authorized and directed to expend the same in the improvement of the water-power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been or may be granted for that purpose by the Legislature of the State, or which may *hereafter* be granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity; provided that said Cushman shall execute and deliver to the mayor an agreement from him to

the city of Ottawa, that he will, without unreasonable or unnecessary delay, cause a good and substantial dam to be constructed across the Illinois river above the city, to bring into use all the available water-power of said rivers at Ottawa, and will construct sufficient head and tail races to make such water-power available; said races to be constructed and continued to the Fox river below the aqueduct and above the island in Fox river, *as fast as the same can be leased at fair and reasonable rates, and be brought into actual operation;* and that he will also erect a good and substantial dam across Fox river, so as to make available the water-power of both rivers at Ottawa as soon as the additional water-power created by such dam across Fox river *can be brought into actual use, by being leased at reasonable and fair rates*, so as to have all the available water-power of both rivers at Ottawa ready for use as fast as called for. And provided, also, that said Cushman shall bind himself that if said work is not constructed as aforesaid, that he will return said bonds to the city, or the value of the same, and save it harmless from all loss on account of the same, * * * and in case said dam shall not be completed by said Cushman, then to return a *pro rata* share of said bonds." (See Rec. page 33 - .)

In pursuance of this ordinance the following contract was entered into between the city and Cushman.

"This agreement, made this 2d day of August, A. D. 1869, between William H. W. Cushman, of Ottawa, Illinois, party of the first part, and the City of Ottawa, in the county of LaSalle, Illinois, party of the second part, witnesseth: that whereas the said Cushman has received from the city of

Ottawa aforesaid the bonds of said city to the amount of sixty thousand dollars, to be used in developing the natural resources of the city, and to be expended in the improvement of the water-power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof, said bonds having been issued by said city in pursuance of an ordinance passed by the City Council of said city on the 15th day of June, A. D. 1869, entitled, 'An ordinance to provide for a 'loan for municipal purposes,' which was ratified by the voters of said city on the 20th day of July, A. D. 1869, and of an ordinance passed by the City Council of said city on the 30th day of June, A. D. 1869, entitled 'An Ordinance to carry into effect the ordinance of June 15th, 1869, entitled, 'An ordinance to provide for a loan for municipal purposes;' now, therefore, in consideration of the premises, the said William H. W. Cushman for himself, his heirs, executors and administrators doth by these presents covenant and agree to and with the city of Ottawa, aforesaid, that he will, without unreasonable or unnecessary delay, cause a good and substantial dam to be constructed across the Illinois river, above the city, sufficient to bring into use all the available water-power of said river at Ottawa, and will construct sufficient head and tail races to make such water-power available, said races to be constructed and continued to Fox river, below the acqueduct, and above the island, as fast as the same may be required for actual use, and as fast as the water-power can be leased at fair and reasonable rates, and that he will also construct a good, substantial and sufficient dam across the Fox river, below the acqueduct, whenever the same shall be necessary to make available the water-power of both rivers,

at Ottawa, and be necessary for the use of said water-power; and whenever the said water-power, made available by the construction of said dam across Fox river can be leased at fair and reasonable rates, so as to have all the available water-power of both rivers at Ottawa ready for use as rapidly as called for. And said Cushman also binds himself, his heirs, executors and administrators, to and with said city, that in case said work shall not be performed to the extent of constructing a dam across the Illinois river, and races to make the water-power thereby created available for practical use, that he will return said bonds, or the value thereof, to the city, and save and keep harmless the said city from all loss on account of the same, or on account of the interest accruing thereon. And in case the work shall be performed to the extent above indicated, but shall not be completed by the construction of all the dams and races herein before specified, then said Cushman shall return to said city a *pro rata* share of said bonds as the value thereof, in the proportion that the cost of the work constructed shall be, as to the cost of that part of the work not constructed. The said Cushman to be exonerated from all liability of any kind to the city for or on account of said bonds, when he shall have performed the agreement, herein expressed to be performed by him, at the times stipulated for the performance of the same. The bonds being appropriated by the city to secure the completion of said work, and without other consideration than the public benefit resulting to the city thereby. And it is hereby agreed that nothing in this contract, nor in the ordinances therein referred to, shall give to said city any right, title, interest or ownership, either in law or equity, in the said

improvements when completed according to the conditions and stipulations herein contained."

Having sufficiently noticed the question as to the effect of the recitals upon the face of the bonds, and as to the negotiability of the bonds and coupons, I will now proceed to consider the other questions particularly presented by the record in the pending case.

I.

The city, at and before the issue of the bonds, assumed that it had corporate power to issue them, and that they were issued for a corporate purpose—a municipal purpose. The people gave their sanction to this view of the corporate power of the city under the charter (as to which, however, there can be no question), and of the corporate purpose for which the bonds were issued. By their vote to incur the indebtedness and issue the bonds as evidence thereof, this debt was assumed by them voluntarily, and not imposed upon them *in invitum*. The purpose, to aid which the bonds were issued, was a public one, and none the less so because it was proposed to be accomplished through the agency of Cushman, who, it was further contemplated, might seek the collateral aid of a private corporation to promote the accomplishment of the desired improvement—the promotion of which, from its nature, necessarily affected the general interests of the entire community.

The charter, it will be observed, confers the right to issue bonds without restriction as to the amount or purpose (Sec. 3, Art. 5), except that by Sec. 20 of Art. 10 it is provided that "no money shall be borrowed by the the City Council until

"the ordinance passed therefor shall be submitted to and voted "for by a majority of the voters of said city attending an "election for that purpose." Coupled with this power of incurring indebtedness is conferred the power upon the City Council "to appropriate money and provide for the payment "of the debts and expenses of the city." Hence, as said by Ch. J. Waite in the Hackett case, 99 U. S. 86, "It is clear, "therefore, that the Council, having secured the assent of the "requisite majority of voters, might rightfully borrow money "upon the bonds of the city for every purpose which could "fairly be deemed municipal or corporate." It will be noticed that as to what is *a municipal purpose, in point of fact*, is left to the determination of the voters of the city, which involves simply the question as to whether the measure proposed to be aided by the issue of bonds is one "which will promote the general prosperity and welfare of the community."

A reference to the ordinance of June 15, 1869, (Rec. p. 32), discloses that the object of the aid voted was not simply the advancement of the private interests of the Ottawa Manufacturing Company, but the bonds were to be issued and delivered to Cushman, "to develop the *natural resources* of the surroundings of the city," and he is thereby directed to expend the same *under the franchises and powers granted*, or which *might* be granted by the *legislature* of the State *for that purpose* in the manner which in his judgment should best secure the practical and permanent *use of the water-power in the city* and its immediate vicinity, and then proceeds to provide in detail for the execution of a contract by Cushman for the faithful performance of the trust imposed upon him, in a cer-

tain manner and under certain restrictions, "so as to make "available the water-power of both (the Fox and Illinois) "rivers *at Ottawa*, as soon as the additional water-power "* * * can be brought into use by being *leased at* "*reasonable and fair rates* * * * as rapidly as "called for." It will be thus seen that the declared purpose was a public purpose, which was proposed to be promoted, —viz., to so utilize this water-power that it could be used and leased at reasonable and fair rates—that is to say, it was to be made available to any and all persons who should desire to use it, whether for the purpose of running flouring mills or as a motive power for propelling machinery used for other manufacturing purposes or for domestic use.

By the 8th section of the act of 1851, referred to on page 30 of the Record (Private Laws of Ill of 1851, pp. 179–180), the Ottawa Manufacturing Company is invested with the right to enter upon and flow lands, and to that end to exercise the *power of eminent domain* by the condemnation of property to the uses required, upon making compensation in damages, through the institution of the proper judicial proceedings, which of course, as held by this court in the Munn case (94 U. S. 113), subjected the corporation in a measure to the supervision of the legislature with reference to the manner in which its franchises and privileges should be exercised, and the imposition of tolls or charges for the use of the water power, as contemplated by section 2 of the act. ~~(Record 29.)~~

The 8th section of this act is not referred to in the pleas, but is a public act (see sec. 10), of which this court will take judicial notice.

Further, as bearing upon the question as to whether the issue of bonds by the City of Ottawa in aid of the Ottawa Manufacturing Company was a public or municipal purpose, the attention of the court is here called to the fact that the general assembly of Illinois, on the 19th of February, 1867 (Private Laws of Ill. of 1867, vol. 2, p. 350), two years prior to the issue of the bonds in question, passed an act authorizing the city to subscribe $100,000 to the stock of this Manufacturing Company, and appointed commissioners to make such subscription on behalf of the city, and by section 2 of said act, the commissioners, in order to pay such subscription, were authorized to make, execute and dispose of the bonds of the city. Section 3 provides for the levy of a tax to pay interest on the bonds; and sections 4 and 5 particularly define the duties of such commissioners.

It is apparent that the legislature regarded that this Manufacturing Company and its proposed development of the water-power of the Ottawa and Fox rivers as matters of public interest; but the act authorizing the commissioners to issue bonds, and thus impose a debt upon the city and subject it to the liability of stockholders was clearly unconstitutional and void, hence, all proceedings under it were abandoned, as found by the court below:

Gage v. Graham, 57 Ill. 144.
People v. Mayor, 51 Ill. 18.
Howard v. St. Clair Co., 51 Ill. 130.
Town of Middleport v. Ins. Co., 82 Ill. 562.

The contract with Cushman, as provided for in the ordinance set out in the pleas (Rec. p.) was that they

were "to be used by him *under the franchises* and *powers* "*which have been granted for that purpose by the legislature* "*of the State*, or which *may hereafter be granted* for that "purpose."

The powers conferred upon Cushman by the ordinance were those of an agent or trustee of the corporation, to appropriate the bonds under the powers that *had* been or *thereafter might* be granted by the legislature; and to indemnify the city against any *misappropriation*, it was provided, "that said "Cushman shall bind himself that if said work is not con- "structed as aforesaid, that he will return said bonds to the "city, or the value of the same, and save it harmless from all "loss on account of the same, or on account of interest accru- "ing thereon; and in case said work shall not be completed "by said Cushman, then to return a *pro rata* share of said "bonds, in the proportion that the cost of the work constructed "shall bear to the part of the work not constructed. (Record p. 35-9)

The city issued the bonds in question under its general and indisputable powers conferred by its charter, and so affirms upon the face of the bonds; hence it is entirely immaterial, as against the plaintiff, as a *bona fide* holder, whether Cushman made any lawful or unlawful or unauthorized appropriation of them. That is matter entirely between the city and Cushman, and if the existing legislation was not sufficient to or did not authorize the appropriation of these bonds, issued unded the general municipal power of the city, which is alleged to have been made, and additional legislation was required to authorize Cushman to make such an appropriation of them as

contemplated by the ordinance, and he appropriated the bonds *before* the additional legislation was procured, the city, as before suggested, has its remedy for the misappropriation under its contract. So this is simply a question between the city and Cushman, and can not affect the plaintiffs' rights. The ordinance contemplates only a *lawful* appropriation of the bonds issued by the city under its unquestionable municipal powers; and if any unauthorized or unlawful appropriation of them was made, the city is abundantly protected; and it is apparent it meant to and did jealously guard against any appropriation except as lawfully authorized, or which might thereafter be lawfully authorized by the legislature.

According to its own showing by the pleas interposed, the defense of *ultra vires* is a mere afterthought, and a shamefully dishonest attempt of the city to avoid its legal obligations and defraud its bondholders, rather than to seek its remedy, which is ample, against its own public servants and agents, for the breach of any public duty or trust, if any has been committed. It is by no means material to the determination of the question involved, whether the city issued its bonds in payment of a stock subscription under the act of the legislature authorizing it, or whether under the general powers contained in its charter. The distinction between a "donation" and a subscription being, as remarked by the Supreme court of Illinois, merely a shadowy one. The question is simply whether the general purpose of the corporation in aid of which bonds are voted is a *public purpose*, one affecting the general interests and property of the political community, or of a

private character; if the former, and there is legislative authority for it, it is a corporate purpose.

In *Maher v. The City of Chicago*, 38 Ill. 273, the Supreme court of Illinois say: "If a municipal corporation "dealing with individuals *assumes* that it possesses certain "corporate powers, upon which the validity of its acts depend, "and it turns out that it does *not* possess the *specific* power "relied on, it is not thereby excused from the performance of "its obligations *if they can be performed through the agency* "*of other powers* which it does possess."

But I submit that the city had undoubted power to issue its bonds in and of this manufacturing company, independent of any act of the legislature authorizing it to subscribe to the company as provided for in the ordinances of the city. As has been before suggested, the issue of the bonds was not a "donation" to a *private* corporation, but was an *appropriation* in aid of a public improvement, which affected the interests of an entire community, and whereby it was sought to enlarge the *natural* advantages of the city and its surroundings by the development of the water-power, and thus to aid in the establishment of flouring mills and other public enterprises, and to secure the use and enjoyment of these increased privileges upon reasonable terms and without unjust discriminations. It was not, primarily, the direct pecuniary interests of the manufacturing company, as a private corporation, that were sought to be promoted, but the *general* interests of the community, as is apparent from the ordinance. (Rec. 33-4) It was a proper *municipal purpose*, which the city might promote through the agency of a private corporation; hence the pro-

vision, that the improvements shall be so completed as shall "best secure the practical and permanent use of said water-"power in the city and its immediate vicinity, and that it "should be leased at reasonable and fair rates."

It was urged, however, in the court below, that the issue of the bonds was in violation of § 5 of Art. 9 of the constitution of Illinois of 1848. This provision this court has frequently had occasion to consider; it is as follows: "The corporate authori-"ties of counties, * * * cities, etc., may be vested with "power to collect and assess taxes for corporate purposes; "such taxes to be uniform in respect to persons and property "within the jurisdiction of the body imposing the same," etc.

There are certain objects which would be readily conceded not to be corporate purposes, and other objects which would be as readily conceded were corporate purposes, and still other objects, to determine the character of which in this regard, resort would necessarily be had to extraneous matters; and when the legislature has declared those of the latter class to be proper subjects of municipal aid by taxation and appropriations made for their promotion, the courts have ever refrained from assuming to judicially overrule the judgment of the legislature.

The Supreme court of Illinois, in *Taylor v. Thompson*, 42 Ills. 11 (in an opinion delivered by the learned counsel for the defendant in error, then one of the members of that court), says: "When, therefore, the legislature has authorized the "levy of certain taxes, and has thereby declared them to be, "*in its opinion*, taxes for *corporate purposes*, we should not

"hold such taxes to be unconstitutional, *merely because their* "*corporate character admits of some debate.* A proper "respect for the legislative department of the government "requires us to regard its acts as *prima facie* constitutional; "* * * that the framers of the constitution deemed that "they had furnished *all* the safeguards that were necessary in "this behalf, when they provided for absolute equality of tax- "ation; and that they thought it unwise to hamper the legis- "lature by any restrictions as to either the subjects or pur- "poses of taxation, is evident from the sixth section of the "ninth article above quoted. That section provides that "the specification of the objects and subjects of taxation shall "not deprive the general assembly of the power to require "other objects or subjects to be taxed. * * * And who "will deny that this was a wise abstinence on their part, "when we take into view the ever-varying emergencies of "society, and the rapid development and unforseen needs of "our modern civilization?" The court then proceeds to determine that a tax imposed by the corporate authorities of a township to pay bounties to persons who should thereafter enlist or be drafted into the army, was constitutional within the meaning of the fifth and sixth sections of article nine of the constitution of the State.

Senior for Plaintiff in error,

The learned counsel (who himself delivered this opinion) insisted, upon the argument of this case in the court below, that it was entitled to no weight as authority, and was rendered simply in obedience to the exigencies of the times, which demanded a strained construction of the constitution, to further all efforts to suppress the war of the Rebellion. However

this may be, and whatever may be said as to the propriety of the decision of the court in that particular case, *the definition* of the term "*corporate purposes*," as defined in the constitution, expressed in the opinion delivered, is a sound one, and one which has never been in any substantial degree overruled or qualified by any subsequent decision of that court, but on the contrary, has been subsequently endorsed and approved; and, with due respect to our learned friend on the other side, we submit that he is not now, while acting professionally, authorized to retract what he before judicially pronounced as the unanimous judgment of the Supreme court of the State.

In the case of *Burr v. the City of Carbondale*, 76 Ills. 455, a tax imposed by the city in support of the Southern Illinois Normal University, to which the people had voted aid under an act of the legislature, was held valid within the provision of the constitution above quoted, and that the aid being *so voted* the taxes were not imposed *in invitum* (Opinion p. 468), and Chief Justice Breese, in referring to *Taylor v. Thompson*, *supra*, says it was there "held to mean a tax to be "expended in a manner which should promote the general "prosperity and welfare of the municipality which levied it, "* * but in that case a *vote* of the people authorizing the "tax was first to be taken, and the people, in fact, *voted* the "tax. This was an important fact in determining that case. "We thought it difficult to determine with precision what was a "'corporate purpose,' in the sense of the constitution, but "came to the conclusion, that it was *such a purpose*, and such "only, as might have a legitimate connection with objects and

"purposes promotive of the welfare of the municipality, and a "manifest relation thereto." (Opinion p. 464.)

Brisco v. Allison, 43 Ills. 291.

Johnson v. Campbell, 49 Ills. 316.

Misner v. Bullard, 43 Ills. 470.

And in *The Chicago, etc., R. R. Co. v. Smith*, 62 Ills. 227, the court say: "In *Taylor v. Thompson* this court defined a "*corporate purpose* to mean '*a tax to be expended in a man-*"*ner which shall promote the general prosperity and welfare* "*of the municipality which levies it,*' *and the court declares* "*that the distinction between a donation and a subscription is* "*more shadowy than real*"—*in fact, in the view of the court entirely shadowy.*

The court, in *The People v. Dupuy*, 71 Ills. 653–5, point out the distinction between those municipal corporations enumerated in the constitution, and *quasi* corporations not named, and which have no general municipal powers such as are possessed by towns and cities, and therefore limited in their powers of taxation to the precise purpose they are created to subserve; and the court in this case again recognized and approved the doctrine of *Taylor v. Thompson* (p. 655).

The doctrine of the case last cited was again pronounced in *The People v. Trustees of Schools*, 78 Ills. 136. And again most emphatically in *Burr v. Carbondale, supra*, which case is worthy of special attention. And more recently still the *Quincy, etc. R. R. Co. v. Morris*, 84 Ills. 410. By the latter case, the difference between municipal corporations such as cities and towns, and *quasi* municipal corporations,

such as school districts, etc., is also clearly defined, wherein the court held that a subscription by the city to a railroad company in Missouri was for a corporate purpose, and the court say (p. 419): "To say that an enterprise of this char-"acter would add nothing to the *commerce and prosperity of* "*the city*, would do no less than repudiate what has been held "in this court in the numerous cases from *Johnson v. Stark* "*Co.*, down to the present time." And see also *Hensley Township v. The People*, 84 Ills. 544. See also Macon v. Shannontown 77 Ill 533

The power conferred by section 3 of the charter of the city, "to borrow money on the credit of the city, and to issue "bonds therefor, and pledge the revenues of the city for the "payment thereof," gives the unquestionable right to the city to borrow money for any "corporate purpose" within the meaning of the constitution. The right of cities, etc., to borrow money and issue bonds in aid of railroad enterprises has been sustained simply for the reason that such aid in the establishment of public highways was deemed to be for a corporate purpose; but that while such an indebtedness could not be imposed upon the political community *in invitum*, yet if the people were permitted to vote upon the question, and *did vote* to issue bonds under the law, they were held valid.

The question as to whether the bonds in suit are valid, involves the question of the validity of commercial securities, which this court will determine for itself. They have never been held invalid by the State court, and we submit they are unquestionably sustainable as valid obligations under the constitution of the State. This court, in *Pine Grove v. Talcott*, 19 Wall. 666, said: "Questions relating to bonds issued in a

"negotiable form, under an act of a State legislature, involving "questions relating to commercial securities, and whether, "under the constitution of the State, such securities are valid "or void, belongs to the domain of general jurisprudence. "This court will accordingly not follow the decisions of the "court of the State where the bonds are issued, as to their "validity and constitutionality under the laws and constitution "of the State, if the judges here disprove of those decisions."

The improvement, in aid of which the bonds in question were issued, was clearly one for the general benefit of the city, proposed to be effected through the agency of a private corporation; the object being to obtain an additional supply of water-power, and to utilize it in any manner which would subserve the interests of the people, and by which it might be supplied at fair rates for any and all general purposes, whether to propel grist mills, flouring mills, saw mills, or other machinery used in connection with any other industrial interests. It is evident that the object of the creation of this corporation was not exclusively for the carrying on of a manufacturing business for its own private benefit, but it was expressly authorized to "*lease*" *the water-power to others*, as provided by the ordinance of July 30, 1869, (Record pp.), *and the bonds were issued to secure these advantages to the general public*, and under a contract with Cushman, one of the corporators, whereby such a distribution of the advantages was provided for, and ample indemnity also provided for the fulfillment of this provision.

By section 8 of article 5 of the city charter, express power is given "to provide the city with water and erect

hydrants and pumps in the streets." Certainly no one will question but that this was a corporate purpose; nor can it be doubted that the city had ample power to contract with this corporation as well as with any private individual for such a supply of water for general purposes; nor can it be questioned that under the contract with Cushman the city had the right to demand the leasing at fair rates of so much of the water-power proposed to be created, as should be required to supply the hydrants in the streets, whether for domestic use or to maintain a system of water-works for the extinguishment of fires. That such were legitimate public purposes--municipal purposes — will not be denied, and no doubt largely influenced the city to issue the bonds and enter into the contract set out. We confidently submit that the power of the city to issue bonds for the above purposes cannot be seriously doubted.

That such were "public purposes" as defined by the decisions of the Supreme court of Illinois, in the cases cited, seems clear; that such powers fall within that class of powers the necessity for the execution of which, in the attainment of a public purpose, as said by the Supreme court of Illinois in *Taylor v. Thompson*, and their numerous other cases, *supra*, may be safely confided to the legislature to define.

In *Gelpcke v. City of Dubuque*, 1 Wall. 202, it was held, that the general power given by the charter "to borrow "money for any public purpose" was amply sufficient of itself to sustain the bonds, and that "where a corporation has "power under any circumstances to issue negotiable securities, "the *bona fide* holder has the right to presume that they were

"issued under the circumstances which give the requisite "authority, and they are no more liable to be impeached for "any infirmity in the hands of such holder, than any other "commercial paper."

The plaintiff in this case, in view of the express power given by the charter of the city, and of the recital upon the face of the bonds (and even if the ordinance had been set out thereon) had, we submit, the undoubted right to assume that those bonds were issued for legitimate public and municipal purposes, and that they cannot be impeached in his hands.

In *Meyer v. City of Muscatine*, 1 Wall. 390, the charter gave the city power to borrow money "for any object in its discretion, upon a vote of the people." When the bonds were issued, special acts were in force authorizing aid to railroads, but the bonds were issued under the general power given, and were sustained for the apparent reason that the object to be subserved was a public purpose, and so declared by the legislature, which, in connection with the charter, formed a complete answer to the alleged want of power to issue them.

See also *Rogers v. Burlington*, 3 Wall. 654, and *Mitchell v. Burlington*, 4 Wall. 270.

where the same doctrine is reiterated, and in the latter case the issue of the bonds was sustained, under a similar general provision of the city charter, in aid of a plank road.

The power conferred by the charter of the city of Ottawa is a general *unrestricted* power "to borrow money * * * and "issue bonds, which, under the rule laid down by this court,

and under the decisions of the Supreme court of Illinois, will sustain bonds issued for any public purpose, and especially in aid of an object manifestly beneficial to the entire community, and *declared by the legislature to be a public purpose*, and authorized to be accomplished through the agency of a private corporation vested with the exercise of the power of eminent domain. It was earnestly contended on the trial in the court below that the case of the *Loan Association v. Topeka*, 20 Wall. 661, was decisive of the case at bar, but we submit that there are no material points of resemblance in the cases. The Topeka case was purely an appropriation in aid of a private individual enterprise, not affecting the public interest further than would the establishment of any other private manufacturing enterprise. The distinction between that case and one of the nature of the case at bar is very clearly illustrated by the opinion of this court in *Beasley v. Burlington*, 94 U. S. 312; but the case at bar is a much stronger one to sustain an appropriation in aid of a "public purpose" than is the Beasley case, for the reasons already suggested. If an appropriation in aid of a steam grist mill is an appropriation for a public purpose, certainly an appropriation in aid of an enterprise whereby water-works for general domestic purposes, or strictly municipal purposes, or to promote the establishment of grist mills, flouring mills, and other general objects of industry, whereby these advantages are secured to an entire community, are certainly none the less so.

The legislature having granted the franchises (including the right of the exercise of the power of eminent domain) to the Ottawa Manufacturing Company, under the decision of

the case of *Munn v. Illinois*, 94 U. S. 112, has the undoubted right to regulate and control this Manufacturing Company in regard to the manner in which it shall exercise its franchises and privileges, not only in the exercise of the power of eminent domain in the acquisition of property, but in the imposition of tolls and charges for the use of its water power, and to provide against unjust discriminations and impositions upon the public.

As a strongly analogous case, the attention of the court is asked to *The People v. Kelly*, 76 N. Y. 477, where an indebtedness was incurred to aid in the construction of the bridge between New York and Brooklyn which was held to be for a public purpose, notwithstanding the bridge company was a private corporation, and there existed the following constitutional restriction, viz. : "No county, city, town or village "shall hereafter give any money or property, or loan its "credit to, or in aid of any individual, association, or corpor- "ation, or become, directly or indirectly, the owner of stock "in, or bonds of any association or corporation ; nor shall "such county, city, town or village be allowed to incur any "indebtedness, *except for county, city, town or village* "*purposes.*"

The court say (p. 486 to 490) :

"The Act of 1875, is not, as claimed by the appellant, "in conflict with the constitutional provision above recited. "It was not the purpose or effect of the Act to make the city "of New York a stockholder in the bridge company, or to "cause it to loan any money or credit to such company. * * "* Nor can it be said that the indebtedness authorized to be

"incurred by the city for the construction of the bridge, was "not for a city purpose. *It is impossible to define in a general "way, with entire accuracy, what a city purpose is, within "the meaning of the constitution. Each case must largely "depend upon its own facts*, and the meaning of these words "must be evolved by a process of exclusion and inclusion in "judicial construction. It would not be a city purpose for "the city of New York to build a railroad from that city to "Philadelphia, or to improve the navigation of the Hudson "river generally, between that city and the city of Albany, "although incidental benefits might flow to the city. Such "works have never been regarded as within the legitimate "scope of municipal government. On the contrary, *it would "be a city purpose to purchase a supply of water outside of the "city, and convey it into the city*, and for such a purpose a "city debt could be created. So lands for a park for the "health and comfort of the inhabitants of a city could be "purchased outside of the city limits, and yet conveniently "near thereto. *Such improvements are for the common and "general benefit of all the citizens, and have always been "regarded as within the scope of municipal government*; and "so, too, highways or streets leading into a city or village "may be improved, provided the improvements be confined "within *such limits* that they may be regarded as for the "*common benefit and enjoyment of all the citizens.* It can "not, therefore, well be held, as claimed by the learned "counsel for the appellants, that what is meant by a *city "purpose*, is some work or expenditure *within the city limits.* "There could be no good reason for such a limitation. It "could be no worse for a city to incur debt for a *a city purpose*

"*outside of the city limits than for one within such limits,* "and there is just as much reason for allowing it to be incur- "red in the one case as in the other.

"* * * But as to the dividing line between what "is a municipal purpose, and what is not, is in many cases "shadowy and uncertain, great weight should be given by the "courts to the legislative determination, and its action should "not be annulled unless the purpose appears clearly to be one "not authorized. As said by Judge Folger in *Weismer v.* "*Village of Douglas*, 64 N. Y. 91: '*If the purpose designed* "*by the legislature lies so near the border line, that it may be* "*doubtful on which side of it it is domiciled, the courts may* "*not set their judgment against that of the law makers.*' "* * * *Therefore, having nothing to say about the* "*wisdom of the legislation under consideration, I am confident* "*in the conclusion that the construction of this bridge is a city* "*purpose of each city, and that each city can incur debt for* "*the same, and that the act of* 1875 *is not in conflict with* "*any provision of the constitution.*"

This case is a most emphatic endorsement of the doctrine of *Taylor v. Thompson* and the other Illinois cases *supra*.

II.

The city is bound by its own construction of its charter power in this instance, and determination as a matter of *fact* that the purpose for which the bonds were issued was a municipal purpose, "as said by the Supreme Court of Illinois "to promote the general prosperity and welfare of the munici- "pality."

"It is not universally true that a corporation cannot "bind the corporation beyond what is expressly authorized "in the charter * * * and if a series of contracts have "been made openly and palpably with the knowledge of the "corporators, the *public* have the right to *presume that they* "*are within the scope of their authority* granted. * * The "object of all law is to promote justice and honest dealing, "when it can be done without violating principle. I cannot "perceive that any principle is violated by holding the cor- "poration liable for the contracts of their accredited agents, "even not expressly authorized, when those contracts for a "series of years were entered into *publicly and in such man-* "*ner by necessary and irresistable implication to be* within "the knowledge of the corporators. * * * But, when "to these circumstances we add, that these corporators them- "selves *received the value of these notes* and contracts in the "erection of improvements, and still enjoy the value of them, "the conclusion is irresistable that the corporation ought to "pay them. * * * The debt by positive engagement, is "due *ex equo et bono*, in the forum of conscience and in the "forum of law. * * * If they receive the avails and "value of those acts, it is implicit evidence that they con- "sented to and authorized them; they adopt the act and are "responsible to those who on the faith of such acquiescence "and appropriation, trusted their agents. I speak now upon "the basis of contracts not prohibited by statute."

McClerkin v. Allegheny City, 14 Penn. St. 82.

That the construction given to the charter by the city authorities themselves, and their determination that the im-

provement sought to be aided was a corporate purpose, is conclusive upon the city, is shown by the following cases:

James v. Milwaukee, 16 Wall. 159–162.
Adams v. Lawrence Co., per Greir, J., 2 *Pittsburg*, U. S. C. R. 44–5.
Luling v. Racine, Bissel, 314–318–319–320.
Vanhostrup v. Madison City, 1 Wall. 291–297.
City of Memphis v. Brown.
Meyer v. Muscatine, 1 Wall. 373.
Davis v. Hudecker, 98 U. S. 98–100.

The city having voted for the issue of the bonds, and thus given a practical construction of its own charter, and determined that the improvement was a "public purpose," beneficial to the entire community, it is estopped as against *bona fide* purchasers from now denying its authority.

Society for Saving v. New London, 29 Conn. 174.

This last case is endorsed by this court in *Moran v. Comrs.*, etc., 2 Bla. 272; *Orleans v. Platt*, 99 U. S. 576.

Municipal corporations have the same powers of private persons with respect to their contracts, except when by necessary implication restricted.

City of Keithsburgh v. Frick, 34 Ill. 405.
City of Galena v. Corwith, 48 Ill. 424.
Rumbroth v. Pittsburg, 41 Ill. 278.
Moran v. Ray, 19 Wall. 468.

All doubts as to their corporate power should be solved in favor of a *bona fide* holder when a *general power exists to*

execute bonds, and they are issued under such circumstances of general publicity as to warrant the inference that the purpose of their issue was well known to the citizens generally, the municipality is estopped from questioning their validity after their issue and sale. It is gross negligence—which will not be tolerated, — for them to promote the negotiation of their bonds under such circumstances of general publicity without any attempt to enjoin their issue.

County of Ray v. VanSickle, 96 U. S. 675–687.
Orleans v. Platte, 99 U. S. 681–2.
Block v. Commissioners, 99 U. S. 686–694–696.

Eames was a *bona fide* purchaser of the bonds. He was not chargeable with constructive notice of any thing but the charter power of the city to issue them; not even gross negligence; nothing short of positive fraud, and an attempt on his part, in collusion with the officials of the city to commit a fraud, could impair his right as a *bona fide* holder; gross negligence, even, alone, would not affect it.

Duffy v. Schuyler, 42 Ill. 307.
Murray v. Lardner, 2 Wall. 120–123.
Cromwell v. Sac Co., 96 U. S. 51–57 to 60.
Swift v. Smith, *Legal News*, Jan. 22, 1881, p. 151.
National Bank v. Crowe, 60 N. Y. 85.
Sybil v. National Currency Co., 54 N. Y. 288.
Chapman v. Rowe, 65 N. Y. 137.
Welch v. Sage, 47 N. Y. 143.
Byles on Bills, 115.
Comstock v. Hannah, 76 Ills. 530–534.

Comstock v. Clark, 94 U. S. 285.
Railway Co. v. Sprague, 103 U. S. 757.

The doctrine of these cases, expressly endorsed in *Duffy v. Schuyler*, *supra*, which holds also, that a person questioning the fairness of the transfer to defeat a recovery, must prove that the transfer was not for value, or that it was made for a fraudulent purpose; and *Comstock v. Hanna*, 76 Ills., expressly endorses the early case of *Goodman v. Simmonds*, 20 How. 343, and *Murry v. Lardner*, 2 Wall. 110, and the New York cases cited. (See also, 1 *Parsons Notes and Bills*, 258,) and the court in *Duffy v. Schuyler*, say (p. 536,) "we "accept the doctrine of these cases as correct in principle," and overrule the early case of *Russel v. Haddock*, 2 Gilm. 233. It is also expressly decided in this case that where a person takes an assignment of a note for value before due, and is not guilty of *bad faith*, although guilty of gross negligence, he will hold it by title good and valid against the world, and cannot be made subject to the defense of a failure of consideration. Suspicion of a defect of title, or knowledge of circumstances which would incite such suspicion in the mind of a prudent man, or gross negligence on the part of the assignee at the time of the transfer, will not defeat his title, or let in a defense not otherwise admissable as against it in the hands of such purchaser. That result can only be produced *by bad faith amounting to actual fraud.*

Failure or want of consideration is entirely insufficient to defeat the rights of a bona fide holder for value acquired before maturity of the paper.

Harger v. Worrell, 69 N. Y. 370.

First National Bank v. Green, 43 N. Y. 299.

Nor does a transfer after due rebut the presumption of good faith.

James v. Chalmers, 2 Selden 209–214.

The bonds in question have never been held void by any court, as unauthorized under the constitution of 1848; there can, I submit, be no doubt of their validity—even if it were a debatable question, but it depended upon a question of FACT as to whether the precise purpose for which the bonds were applied was a municipal purpose, Neither Eames nor the plaintiff below were required to investigate that matter; they had the right to rely implicitly upon the determination of the precise character of the improvements by the city, acting in its municipal capacity, who alone was authorized to determine it. They were only required to know that the city had power to borrow money and issue its bonds.

So, in accordance with the rule promulgated by the Supreme court of Illinois and by this court—and recently in *Smith v. Fond du Lac*, by Mr. Justice Harlan (*Chicago Legal News*, August 13, 1881). These bonds must be held valid. It is only when their unconstitutionality is entirely clear, that the court will hold them void.

Richards v. Raymond 92 Ill 612

People v. Marshall Co., 1 Gil. 409.

C. D. V. R. R. Co. v. Smith, 62 Ills. 268.

Chance v. Marion Co., 64 Ills. 66.

People v. Comstock 73 Ills 191

I therefore will, as concisely as possible, apply the foregoing propositions to the pending case, that there may be no misapprehension on the part of the court as to the views entertained and intended to be expressed:

(1.) The city charter confers the right to issue bonds without restriction as to the amount or purpose (section 3 of article 5), except that section 20 of article 10 provides that no money shall be borrowed until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of the city attending an election held for that purpose. It will be further observed that section 4 of article 5 confers power upon the city to appropriate money to provide for the payment of the debts and expenses of the city. Under the general powers conferred by the charter, as said by Chief Justice Waite, "it "is clear, therefore, that the Council, having secured the assent "of the requisite majority of voters, might rightfully borrow "money upon the bonds of the city for every purpose which "might be fairly deemed municipal or corporate." (*Hackett v. Ottawa*, 99 U. S. p 93).

The significance of the definition of a corporate purpose contained in the opinion in *Taylor v. Thompson*, *supra* (which has ever since been adhered to by the Supreme Court of Illinois, and most emphatically endorsed by that court in the numerous cases cited down to and including that of the *Q. M. & P. R. R. Co. v. Morris*, 84 Ills. 410), is this: That the question as to what is a corporate purpose involves simply the question as to whether the proposed measure is one which will "*promote the general prosperity and welfare of the municipality.*" If it be such a purpose, then the city may designate

as its agents any individual or private corporation to perform any act necessary to be done to accomplish the municipal purpose desired. If the accomplishment of such a municipal purpose can not be effected unless the city become a stockholder in a private corporation, the practical effect of which would be to render the city liable, as other stockholders would be, by reason of that relation, and whereby the interests of the city would be dependent largely upon the successful prosecution of the private enterprise sought to be aided, it is conceded that (under the constitution of Illinois of 1845, as construed by the Supreme Court of the State), direct legislative authority would be required. If, however, the business of such private corporation was *manifestly* of such a character that it could result in no general benefit to the city beyond that which would ordinarily flow incidentally from the successful prosecution of any ordinary private enterprise, then it is conceded that any act of the legislature assuming to confer power upon the city to make an appropriation in aid of *such* a strictly private corporation, under the decision of the Supreme Court of Illinois, would be unconstitutional and void. *The Topeka case*, 20 Wall. 661, and the *Kankakee Linen Factory case*, 64 Ills. 249, cited by defendant's counsel in the court below, are fair illustrations of such unconstitutional appropriations as I readily concede. But, as I have already stated, it being clear that under the charter the city has power to issue bonds for *any* purpose which can "fairly be deemed municipal or corporate," viz: which shall "promote the general prosperity and welfare of the municipality," (and the bonds reciting upon their face that they were issued for *municipal pur-*

poses) are certainly *prima facie* valid; any purchaser of such securities before maturity for value, in good faith, believing them to be valid, has a right to assume that the recitals upon the face of the bonds *import absolute verity*, and he is not required to go and inquire about to ascertain whether the Council proposes to make some unauthorized appropriation of the money. He is simply chargeable with notice of their corporate power under the statute to borrow money for municipal purposes There is no such doctrine as *constructive* notice as to the purpose for which a person or corporation proposes to apply money borrowed. In this case there existed a public act creating the Ottawa Manufacturing Company (private laws of 1851, p. 178–180), by which the legislature invested the corporation with the right to construct a dam across Fox river for *hydraulic and manufacturing purposes*, with the power to take or flow any real estate deemed necessary, upon making compensation, by the exercise of the power of eminent domain. The legislature was moved to do this, it must be assumed, because it believed that it would create a vast water-power, which would be beneficial to the general public, and particularly to the city of Ottawa, and which could be utilized to maintain grist and flouring mills, and various other industrial enterprises, and which might be utilized by the city of Ottawa for municipal purposes as well, and afford an unfailing supply of water for various municipal purposes, which it will be readily perceived might be the case. Hence, this act, we insist, must be considered *a legislative declaration* that the purposes sought to be affected by that private corporation were beyond all question *corporate purposes;* that is to say, bene-

ficial to the general public, especially to the city of Ottawa. (See *Beasley v. Burlington*, 94 U. S. 312, as to a corporate purpose, and as to the distinction between this case and the *Topeka case*).

When the city adopted the ordinance of the 22d of June, 1869, entitled "An ordinance to provide for a loan for "*municipal* purposes," it did not provide (as has been erroneously assumed and repeatedly erroneously stated by counsel for the plaintiff in error) *for a donation to the manufacturing company*. It is declared by section one of the ordinance, that it was for the purpose of developing the *natural advantages of the city* for manufacturing purposes. Thus, it will be seen that it was not primarily the manufacturing company that was thus sought to be aided. but it was the *natural advantages of the city for manufacturing purposes* were was sought to be promoted. If the city possessed *natural advantages* for such purposes, which is not denied, can any one doubt that it was a fair corporate purpose to aid their development in any manner which would render them *generally* beneficial to the public—and when I speak of the public, I of course include the city in its strictly municipal character. Would it not be a proper corporate purpose to build or improve a street leading to extensive manufacturing establishments within the city, so that the citizens could have easy and convenient access to them? or to make docks and other conveniences to reach a navigable stream bordering upon the city? or to cut a channel from the pool of the dam constructed across the river by the manufacturing company, so that the supply of water could be furnished to the citizens *for any and all general purposes*?

and especially which should supply the city with water for the extinguishment of fires, and for domestic use, with a stipulation from any private corporation or private person furnishing it that it should be supplied at *reasonable and fair rates?* Certainly, it seems to me this must be conceded. By the contract executed between the city and Cushman it is apparent from the express words of the instrument, as well as from all the surrounding circumstances, that the PUBLIC BENEFIT *to the citizens*—as therein expressed—was the paramount, and indeed the only consideration which controlled the city in the adoption of the ordinance; and the execution of the contract with Cushman contemporaneously with the execution of the bonds, and by which Cushman was to secure to the *citizens generally* the use of the water for any purpose for which it might be utilized, "*at fair and reasonable rates;*" (to accomplish which he bound himself to the city.) Cushman was thereby made not a municipal officer, but the *agent* of the city. It is clear, therefore, that the city of Ottawa, as did the city of New York, in *People v. Murphy*, *supra*, disclaimed any connection with the Ottawa Manufacturing Company as a *private* corporation, preferring to make a contract with Cushman, and take indemnity from him for the performance of a work which in *their judgment was beneficial to the general public.*

The particular phraseology of the ordinance, viz., "The "development of the natural advantages of the city for manu- "facturing purposes," should not receive a limited construction in its interpretation, and the ascertainment of its purposes, in the light of the surrounding circumstances. Why is

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it not as much a corporate purpose to improve the natural advantages of the city for manufacturing purposes as it is to improve the natural advantages of the city for any other general purpose? and why are not such purposes readily distinguishable from appropriations directly in aid of railroads or other private enterprises? What are municipal corporations formed for, except to promote any and all general interests, and particularly the industrial interests, upon which the prosperity of the community is so largely dependent, in connection with the protection of life and property? If the accomplishment of such purpose can only be effected through the building of a railroad or navigable canal, or the improvement of a water course, *connecting the city with remote places, or any similar* "EXTRANEOUS" ENTERPRISE, it is conceded that this could only be done by direct legislative authority; but in the pending case the purposes sought to be promoted were entirely local in their character, and the determination of *the municipal character of such improvements* rests upon the simple ground of their being *generally beneficial to the community*, and as to whether, as a matter of fact, they are or not, rests, largely, if not exclusively, upon the judgment and determination of the municipality itself. If it be apparent that the improvement is such that the court *cannot judicially* say that it could not possibly be beneficial to the community generally, then the municipal purpose can not be questioned. But, if the purpose be one which is *apparently* beneficial to the entire community, *or if it be simply a debatable* question as to whether it is or not, then the determination of that question, and the practical construc-

tion of its own charter by the city itself (which in this case was done by the enactment of the ordinance distinctly characterizing this improvement as a municipal purpose, and by its contract affirming it to be *for the general benefit of the public*), is conclusive upon the city. (See contract with Cushman.)

And, again, the recitals upon the face of the bonds, and by the sale and negotiation of its bonds, and the levying of taxes to pay interest upon them, must conclude the city upon the question, and estop it from now questioning the municipal character of the improvement, when, as said by Justice Greir, 2 Pittsburg 60, 64–66: "This sharp construction is not "demanded until the convenience of total repudiation has been "discovered." Your Honors, we submit, as said by Justice Greir, will not now permit the city to repudiate its own practical construction of its charter to enable it "to repudiate its "obligations made under it." This doctrine is endorsed in

Woodhull v. Beaver Co., 3 Wal. Jr. 274–278.
McClerkin v. Allegheny City, 14 Penn. St. 82.
People v. Kelly, 76 N. Y. 475.
Society for Savings v. New London, 29 Conn. 174.
Luling v. Racine, 1 Biss. 314.
Orleans v. Platte, 99 U. S. 676.
Ray v. VanSickle, 96 U. S. 675.
Block v. Commissioners, 99 U. S. 686–694–696.
City of Galena v. Corwith, 48 Ill. 424.
Mayor v. Ray, 19 Wall. 468.
Moran v. Commissioners, 2 Black. 782.

In *Jameson v. The People*, 16 Ills. 257, the court,

speaking of the powers of the town authorities to issue negotiable securities expressly given by its charter, "*upon the "faith of which individuals have invested their money,*" that they will after a long acquiescence be precluded from raising any question as to the validity of their acts within the general scope of the powers assumed to be given.

People v. Farnham, 35 Ills. 567.
Adams v. Lawrence Co. 2 Pittsburg, 60–65.

The whole series of decisions cited by counsel for defendant in the court below, with reference to the question of "corporate power," have no bearing on the pending case, as we view it; and so the question was viewed by this court in *Hackett v. Ottawa*, *supra*, where the same line of decisions were submitted by the same counsel for the consideration of your Honors.

Hence, Eames, from whom the plaintiff below purchased the bonds in question, was only required to take notice of the charter; he had a right to rely upon the recitals upon the face of the bonds which affirmed that they were issued for municipal purposes, and the charter power of the city to borrow money, and if he was chargeable with constructive notice of the ordinances, the assertion was there repeated that the bonds were to be issued for the exclusive purpose of promoting the *general interests of the community*—not by aiding the manufacturing company simply, because that was not proposed—but *to develop the natural advantages of the city and its surroundings for manufacturing purposes*, which this court, in *Hackett v. Ottawa*, say they would hesitate "to declare "were not to promote the general prosperity and welfare of

"the community." As said by this court in that case (99 U. S. p. 92): "If by reason of the general reference in the "bonds to the two ordinances of June and July the purchaser "is chargeable with notice of their provisions, * * * "*the utmost which the city, in view of the indefinite language* "*of the ordinance, can claim, is that he had notice that the* "*bonds were issued for the purposes of 'developing the natu-* "*ral resources of the city for manufacturing purposes;* "*nothing more.'*" (See *Railway Co. v. Sprague*, 103 U. S. 756.)

He, Eames, had not heard the validity of the bonds questioned when he purchased them, and even a suspicion on his part that the money was to be expended for a purpose not strictly municipal, would not impair his status as *bona fide* purchaser. Gross negligence, as is shown, even, unless it amount to actual fraud, could not impeach the *bona fides* of his purchase. As said in *Murray v. Lardner*, 2 Wall. 120, *the "question resolves itself into one of honesty or dishonesty." All parties on behalf of the city supposed they were acting within the limits of their municipal authority*, and it is preposterous to suppose that Eames would make an investment of $47,000 in municipal bonds, believing them to be invalid or illegally issued.

The doctrine of *Murray v. Lardner* has been steadily adhered to, and recently endorsed by the decisions of this court and the New York Court of Appeals, in the cases to which I call the attention of your honors, and by the Supreme court of Illinois in *Duffy v. Schuyler*, 45 Ills. 307, and, more recently, *Comstock v. Hannah*, 76 Ills. 503, to the

fullest extent. In view of the great injustice which must result to all these parties ultimately, if this infamous repudiation is sanctioned, entitles these questions, I respectfully submit, to the gravest consideration of the court, for that these bonds were purchased *honestly*, and with the most implicit confidence in the good faith of the city to discharge them, as found by the court, can not be questioned. (Record p. 3 >) Their validity has been repeatedly acknowledged until the "convenience of repudiation," for the most infamous purposes, was conceived and organized to resist their collection.

The same suggestion made in the Portsmouth Bank case is here repeated, viz.: That in view of the unconscionable, shameless, and untenable character of the defense interposed by the city to the collection of the bonds in question, and the repeated decisions of the courts of Illinois, as to what is a corporate purpose, and particularly the decision of this court upon the question in the recent case of *Hackett v. Ottawa*, there is no apparent purpose in the prosecution of this case in this court, except delay, the judgment of the court below should be affirmed with damages.*

[The attention of the court is respectfully asked to the opinion delivered by Judge Blodgett in the decision of the case in the court below, which is herewith submitted. See also *Federal Reporter* (St. Paul) Sept. 4, 1881.]

G. S. ELDREDGE,
For Defendant in Error.

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*An authenticated copy of the proceedings of the City Council with reference to this case, since the rendition of judgment in the court below, will be filed herewith in support of the suggestion that this judgment should be affirmed with damages.

CARY v. CITY OF OTTAWA.

BLODGETT, D. J.—This suit is brought upon certain bonds for $500 each, issued by the defendant city. * * * * * * All these bonds were made payable to W. H. W. Cushman, "*or to the bearer hereof*," and each bond bears upon its face this recital: * * *

The defense set up by the numerous pleas filed in the case is in substance a denial of the power of the city of Ottawa to issue these bonds, and an allegation that the plaintiff holds the same charged with notice of such want of power; the substance of the allegations in the pleas being that these bonds were issued as a bonus to aid a private corporation—the Ottawa Manufacturing Company—in the improvement of the water-powers of the Illinois and Fox rivers, in the immediate vicinity of said city.

The question whether the aid extended by the city to the improvement of its water-power facilities is or is not "*a municipal purpose*," was before the Supreme Court of the United States in *Hackett v. Ottawa*, 99 U. S. 86, in which that court said: "In view of the course of decisions in Illinois, we should hesitate to declare that money borrowed by the city of Ottawa and expended in developing its natural resources for manufacturing purposes, was not, in the sense of the Illinois constitution of 1848, as interpreted by the Supreme court of that State, expended to promote the general prosperity and welfare of the municipality."

It must be added, however, that the court did not consider that question the controlling one in the case, but disposed of

that case upon the question as to whether the recital of the bonds there above quoted did not protect a *bona fide* purchaser for value. That case was before the court upon demurrer to the pleas interposed by the city, which are substantially the same pleas on which issue is joined in this case.

The material facts, as they appear in evidence in this case, are these:

The charter of the city of Ottawa shows that the powers were fully delegated by it to the city council, which are set out in the recitals in the bonds. It also appears that on the fifteenth of June, 1869, the following ordinance was adopted by the common council of the city: * * * *

It further appears that the election called for by the last section of the ordinance was duly held, and that a majority of 823 votes was cast in favor of the ordinance, which the common council, on a canvass of the votes, declared was a majority of all the voters of the city.

It further appears that two private corporations had been chartered or created by the legislature of the State of Illinois, with power to improve the water-power on the Fox and Illinois rivers in the immediate vicinity of the city of Ottawa, and that, by an act of the legislature, approved February 19, 1867, certain persons had been appointed commissioners to subscribe for and in behalf of said city, to the capital stock of one of said companies, the sum of $100,000, and, for and in behalf of the city, to make, execute and dispose of bonds to the amount so subscribed.

On the twenty-sixth day of July, 1869, after the adop-

tion of the ordinance in question and its ratification by the voters, a committee was appointed by the Common Council to confer with W. H. W. Cushman, and negotiate with him in relation to the proposed water-power improvement on the Illinois and Fox rivers in the vicinity of the city. It is also fairly inferable, from the proceedings of the City Council, that either before the adoption of the ordinance for the issue of the bonds, or during the discussions in relation thereto, a proposition had in some form been made that the proposed bonds should be placed in the hands of W. H. W. Cushman, to be in some way used by him in making the proposed improvements, Mr. Cushman being at that time a wealthy and influential citizen of Ottawa.

On the twenty-seventh of July this committee reported to a regular meeting of the Common Council that they had a full and free conference with Mr. Cushman, and on the subject—

"Understand him to be prepared, in consideration of the "proposed bonus, to enter into an agreement or arrangement "with the city substantially as follows: He will agree in "writing to erect as soon as practicable, by the use of all "reasonable energy, a good, substantial and safe dam to bring "into use all the available water-power of the Illinois river at "Ottawa, and to construct sufficient head-races and tail-races "to make all the water-power created by said dam available for "use as rapidly as called for; also to erect the proposed dam "across Fox river to unite the waters of the Fox with those "of the Illinois, as soon as such improvement may be found

"necessary to bring into use all the available water of both "rivers at Ottawa."

And the committee recommended that an ordinance be passed directing that the bonds for $60,000, recently authorized to be issued, be placed in the hands of Mr. Cushman, to be used by him for the benefit of the city in developing the natural advantages of the city for manufacturing purposes; and at a special meeting of the Common Council, held on the 29th of July, an ordinance was adopted directing the mayor of the city to issue the bonds contemplated by the ordinance first mentioned.

On the second of August, 1869, a contract in writing was entered into between the said city and the said William H. W. Cushman, in which he admitted that he had received from the city of Ottawa the bonds mentioned in the foregoing ordinances, and agreed that he would without unreasonable or unnecessary delay, construct the dams and races contemplated in the last-mentioned ordinance; and that in case he should fail to construct the dam across the Fox river, and the races, so as to make the water-power thereby created available for practical use, he would return the bonds or the value thereof to the city, and save and keep harmless the city from all loss on account of the same, or on account of interest accruing thereon.

It further appears that Cushman was a member of the Ottawa Manufacturing Company, and one of its directors, and that on or about the 11th of March, 1871, he delivered to said company the said entire issue of $60,000 in bonds, and that the said Ottawa Manufacturing Company on

the 8th of April, sold to Colwell, Clark & Co. $10,000 of said bonds, and on the 6th of June, 1871, they sold to Lester H. Eames $38,000 of said bonds; that at the time said bonds came into the hands of the Ottawa Manufacturing Company, the coupons for the first year's interest had been taken up by the city, and some short-time bonds given to Cushman in settlement thereof, and that the Manufacturing Company sold the bonds to Eames for their par value, with some slight discount on the second year's interest, which was then running. Eames subsequently purchased $9,000 of the bonds sold to Colwell, Clark & Co., making in all $47,000 of bonds purchased and paid for by him, and after such purchase the city paid two years' interest on said bonds.

At the time the ordinance authorizing the issue of these bonds was adopted by the Common Council, and voted upon by the electors of the city, and at the time the bonds were issued and the contract made with Cushman, Eames was a citizen and resident of Ottawa, engaged in the banking business there, and a subscriber to the corporate newspaper which contained the proceedings of the Common Council relating to the issue and disposition of these bonds.

It also appears by the proof that the Ottawa Manufacturing Company applied the proceeds of these bonds to the construction of the dams across both the Fox and Illinois rivers, and the work was so far completed as to develop some water-power for manufacturing purposes during the season of 1871.

It also appears that Eames continued to hold these bonds until a short time before the commencement of this suit, when

he transferred them to the plaintiff. It is contended that Eames is chargeable with full notice of the fact that these bonds were issued as a bonus to the parties who were engaged in the improvement of the water-power aforesaid, and knew that the city had no authority to aid said enterprise by such issue of bonds, and the question is, it being clear from the proof that Eames was a purchaser for value, is the fact that he did know, or may be presumed to have known, that the only purposes for which the city issued these bonds was to aid in this contemplated water-power improvement, any defense to his right to maintain the action thereon?

This question was so fully discussed in *Hackett v. Ottawa*, and the Illinois authorities as to what is a corporate purpose so carefully considered in that case, that I cannot but consider the intimations from that court as clearly indicating that they considered the purpose for which these bonds were issued as a corporate purpose within the meaning of the Illinois case; and if it was a corporate purpose, then there can be no doubt that a *bona fide* purchaser of such bonds must have a right of action upon them. It is evident, I think, that the Common Council preferred to deal with Cushman as an individual, and accept the guaranty of his personal contract for the faithful application of the bonds for the use for which they were designed, than to deal with a corporation; and the mere fact that Cushman chose to execute his contract through the agency of a corporation which had been created for the purpose of making this contemplated improvement, cannot affect the validity of the bonds in the hands of any one who obtained them for value from or through Cushman. Nor

does it seem to me that even if Cushman had wholly violated his contract, would such violation furnish any defense to the city against a *bona fide* purchaser of the bonds for value from Cushman. What the understanding between Cushman and the Ottawa Manufacturing Company was, the testimony does not disclose; but it does appear satisfactorily that Cushman turned the bonds over to the manufacturing company, and that they expended the proceeds thereof for the purpose for which they were designed by the Common Council and the money which was used in the enterprise was obtained by means of these bonds from Eames.

The Supreme court, in *Hackett v. Ottawa*, held that a purchaser for value need not look beyond the recitals in the bond. But if these bonds were issued for a corporate purpose, suppose he did look beyond the recitals in the bond, and learned or knew that the corporate purpose that was intended was the one actually indicated by the ordinances of the city, and the contract with Cushman, still that furnishes no reason why the purchaser should not be protected.

Much testimony was put into the case on the part of the defendant, in regard to certain proceedings on the part of the Common Council, at an earlier date than that at which these bonds had their inception, looking to a subscription of $100,000 by the commissioners named in the act of February 19, 1867. I do not see how that testimony can affect the validity of these bonds. Either these bonds are good by reason of the recitals on their face, and the facts that were within the knowledge of Eames at the time he purchased them, or they are not; and their validity does not, in my opinion,

depend in any degree upon the abortive attempts at a previous issue, which seems to have been *wholly abandoned* before the issue of the bonds in question was made.

It seems to me that the clear intimation in *Hackett v. Ottawa* are that the improvement of the water-power in Ottawa and its vicinity was a corporate purpose within the meaning of the constitution of 1848, and that conceding that Eames was fully advised of the purpose for which these bonds were issued, he has the right to maintain an action upon them.

Proof was introduced showing that the plaintiff, Carey, derived title to these bonds from Eames, and that he was a member of the Common Council of Ottawa in 1872 and 1873, and that he voted with the other members of the Common Council to repudiate these bonds. The law is well settled, I think, that if these bonds passed out of defendant to a *bona fide* holder for value before due, a subsequent purchaser of the bonds, even with knowledge of any taint upon them is to be protected.

It appears from the proof in this case that the contemplated issue of these bonds was a matter of general notoriety. It was discussed at public meetings, voted upon at a public election, the action of the Common Council was of the most public character, their various ordinances and proceedings in regard to the disposition of the bonds were published in the corporation newspaper, and commented upon by the press of the city generally, and it cannot but be assumed that the citizens of the city, the tax-payers and those interested in the subject, must have known for some time before the bonds were issued, not only that they were to be issued, but the use to be

made of them; and the question is—*is it right that a city which now represents the same citizens who stood by and acquiesced in the issue of these bonds, shall be allowed to repudiate them in the hands of one of their own citizens, even, who has paid full value and whose money has been, so far as we know, faithfully expended for the* purpose which the bonds were designated? Further, here was, at least, a full claim of power to issue them.

This municipality was by its charter empowered to issue bonds to an unlimited extent for corporate purposes, if sanctioned by a vote of the people The city authorities treated water power improvement as a public purpose; the citizens not only acquiesced in it, but publicly voted for it by a large majority. The case appears to me to resolve itself solely into a question of municipal power, and in the light of *Taylor v. Thompson*, and the subsequent cases upon the same question in this State, and the construction given to the powers of this city in the light of these cases by the Supreme court of the United States, I cannot say there was a lack of power in the city to make this issue.

The finding of the court will therefore be for the plaintiff.

IN THE

United States Supreme Court.

OCTOBER TERM, A. D. 1881.

THE CITY OF OTTAWA,
Plaintiff in Error,
v.
THE FIRST NATIONAL BANK OF PORTSMOUTH,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON PART OF DEFENDANT IN ERROR.

STATEMENT.

On the 20th of August, A. D. 1869, the city of Ottawa issued one hundred and twenty bonds of $500 each, with interest coupons annexed, and this suit was brought, originally, by the defendant in error, against the City of Ottawa, to recover upon eight of said bonds with interest coupons attached to each bond. A copy of one of the bonds and of one of the coupons is made a part of the declaration and set

out in *hæc verba*, and appears on page 4 of the record. The bonds in question contain the following recitals:

"This is one of a series of one hundred and twenty bonds "of like amount and even date herewith, numbered one to one "hundred and twenty respectively, issued by the city of Ot- "tawa *by virtue of the charter of said city, wherein it is pro- "vided that the City Council shall have power to borrow money "on the credit of the city and to issue bonds therefor, provided "that no sum or sums shall be borrowed at a greater rate of "interest than ten per cent. per annum. Art. 5, sec. 3.* No "money shall be borrowed by the city until the ordinance "passed therefor shall be submitted to and voted for by a "majority of the voters of said city attending an election for "that purpose. Art. 10, sec. 20. And also in accordance "with a certain ordinance passed by the City Council of said "city on the 15th day of June, A. D. 1869, entitled '*An 'ordinance to provide for a loan for municipal purposes*,' "which was ratified by a *majority* of all the qualified voters "of said city, at an election holden on the 20th day of July, "1869, and in conformity with an ordinance passed by the City "Council of said city on the 30th day of July, 1869, entitled, 'An ordinance to *carry into effect* the ordinance of June 15, '1869, *entitled*, '*An ordinance to provide for a loan for 'municipal purposes*.'"

The plaintiff alleges that on the 1st of August, 1870, he became the purchaser of the bonds, with the interest coupons annexed, at the City of New York, and for a valuable consideration; the non-payment of the bonds and coupons, and the refusal of the defendant to pay the same.

To this declaration the defendant in the court below (plaintiff in error) filed the plea of *nil debit* and the plea of *non est factum* sworn to, and numerous other special pleas. It was stipulated between the parties that all the pleas, with the exception of the first two, should be withdrawn, and the matters set forth in the numerous other pleas should be admissible in evidence under the first two pleas, so far as such matters should be competent evidence in the case, with a like effect in all respects, as if such matters had been specially pleaded.

A stipulation in writing was signed by counsel for the respective parties waiving a trial by a jury and submitting the matters in controversy to trial by the court without the intervention of a jury, and a finding had and judgment rendered in favor of the plaintiff for debt and damages, $5,698.82.

It will be observed by the findings of the court (see Record p. 36) that the court found that the plaintiff below was a *bona fide* purchaser of the bonds sued upon for value before maturity, and without notice or any real or alleged defense thereto.

The bonds sued upon in this case are a portion of the identical bonds from which the coupons were cut, which were sued upon in the case of *Hackett v. Ottawa*, tried before His Honor Judge Blodgett, and which was taken to this court and decided at the October term, A. D. 1878, and is reported in 99 U. S. p. 86, to which decision the court is respectfully referred, and which it is submitted is decisive of the pending case. There is, however, this additional point—if it be a point—worthy of consideration, viz.: That the bonds in ques-

tion were not endorsed by William H. W. Cushman, the payee named in the bonds, the bonds being, as will be observed, payable to William H. W. Cushman "OR TO THE BEARER HEREOF." This additional *point* is regarded as without any substantial foundation, but will be hereafter considered.

It is insisted on the part of the defendant in error that the decision in *Hackett v. Ottawa*, *supra*, is decisive of this case with respect to all the questions sought to be raised by the plaintiff in error, except the latter one, and that the decision by this court in *Roberts v. Bolles*, 101 U. S. 119, is conclusive on that point; and that therefore the judgment in court below in favor of the defendant in error must be affirmed, because (1) the plaintiff below, as found by the court, was a *bona fide* purchaser of the bonds and coupons for value before maturity, and, as held in *Hackett v. Ottawa*, *supra*, had the right to rely implicitly upon the recitals appearing upon the face of the bonds; and the city is estopped from denying that it had lawful authority to issue the bonds, or that the purposes for which they were issued were not corporate or municipal purposes and within the power conferred by its charter, namely: for a purpose deemed to be, and which was in fact, for the general benefit of the community, and fully authorized by the constitution of the State of Illinois, as repeatedly construed by the Supreme court of the State and by this court; and (2) that the question of the negotiability by delivery is conclusively settled by this court in *Roberts v. Bolles*, *supra*.

By the act of the legislature of Illinois, of February 10, 1853, incorporating the city of Ottawa; laws of 1853, p. 296. General power is given to the city "to borrow money on the

"credit of the city, 'and to issue bonds' therefor and 'to "'pledge the revenues of the city for the payment thereof;'" * * * "Provided, that no sum or sums of money shall be "borrowed at a greater interest than at 10 per cent. per "annum." (Sec. 3, Art. 5.)

Among the enumerated powers conferred by the charter, it is provided by section 4 of the same article that the city shall have power "to appropriate money and provide for the "payment of the debts and expenses of the city." Section 8 of the same article authorized the City Council "to provide "the city with water, to erect hydrants and pumps in the "streets for the convenience of the inhabitants."

By section 38 of the same article it is provided that "the City Council shall have power to make all ordinances "which shall be necessary and proper for carrying into execu-"tion the powers specified in this act, so that such ordinances "be not repugnant to or inconsistent with the constitution of "the United States, or this State."

The general power to borrow money conferred by section 3, of article 5, is coupled with this restriction only: "No "money shall be borrowed by the City Council until the ordi-"nance passed therefor shall be submitted to and voted for by "a majority of the voters of the said city attending an elec-"tion held for that purpose." Sec. 20, Art. 10.

The first and last sections above quoted are set forth *in hæc verba* upon the face of the bonds.

So regarding the decision in *Hackett v. Ottawa*, *supra*, as conclusive upon the question that the plaintiff in error is

stopped from asserting as against the defendant in error, that the bonds were not issued for a legitimate corporate purpose, it is, therefore, unnecessary to discuss this proposition in the pending case.

The only remaining question presented by the record, which it is deemed important to discuss is the one sought to be raised, viz., Whether the bonds were negotiable by delivering without endorsement.

It was supposed that the decision of this court in *Roberts v. Bolles*, 101 U. S. 119, following the early decision of the Supreme Court of this State, had put at rest all questions as to the negotiability of municipal bonds of the character of those involved in this case transferred by delivery simply.

(1.) The bonds in question were issued for the express purpose of circulation in all the money markets of the country where such securities are bought and sold, and without this general negotiable quality, they would have been practically valueless for the purpose for which they were designed; and not until the case of *Roberts v. Bolles* has any one in this court, it is believed, ever assumed to question the negotiability of such securities by delivery; and I am aware of no decision of the Supreme Court of Illinois sustaining such a proposition; although the proposition was discussed by counsel for the plaintiff in error with much apparent confidence in the court below, no decision of the Supreme Court of Illinois was cited to sustain it. It is true two or three cases were cited (which will hereafter be noticed), which it was assumed by counsel sustained that view, but an examination of the cases shows

very clearly that they fall far short of establishing such an extraordinary proposition. Were it not that it was presented with so much earnestness by the learned counsel for the plaintiff in error on the trial of this cause before the court below, I should hardly feel justified in discussing it here. The negotiability by delivery of municipal bonds payable to a person named, *or bearer*, or to a person named, "*or the bearer hereof*," has been so long acquiesced in by the courts of Illinois and by this court, as well as by the courts of all other States where the issue of such securities is authorized, that it may be justly said to be the common law of the country, and upon faith of which all such securities have for more than a quarter of a century been bought and sold; whereas divested of this negotiable feature, as before suggested, they would be practically valueless. When the city issued its bonds it authorized them to be placed upon the market for sale *generally in all the money centers and subject to the general commercial law of the country.*

(2.) That such was the purpose of the issue of thes bonds is too apparent to require argument, and is established conclusively from the fact that they are made payable at the city of New York, and their negotiability is controlled by the law merchant and common law, which at the time of the issue of the bonds was and ever since has been in force in New York, and in Illinois as well.

The R. S. of Illinois of 1848, Ch. 62, Title Laws, expressly provides that the common law of England so far as the same is applicable and of a general nature, and all acts of Parliament in aid of and to supply the defects of the common

law prior to the fourth year of James the First, excepting Ch. 6, 43 Eliz.; Ch. 8, 13 Eliz.; and Ch. 37, Henry VIII, "Shall be the rule of decision and shall be considered as of "*full* FORCE UNTIL REPEALED BY LEGISLATIVE AUTHORITY."

In *Cook v. Remmick*, 19 Ills. 598, in a very able and exhaustive opinion delivered by Ch. J. Caton, this statute was construed and it was expressly held that by virtue of it the *law merchant* was in force in Illinois. The learned judge says, p. 602: "The identical question which is presented in "this case was before the Supreme court of Indiana in the "case of *Piatt v. Eads*, 1 Blackford R. 81. The court there "said the whole current of authorities, from the commencement "of our system of jurisprudence down to the present day, goes "to establish the doctrine that the custom of merchants is and "always has been regarded as a part of the common law of "England.

"It is a law of a general nature, and not local to that "kingdom, and is there recognized by the courts as a part of "their system, from the circumstance of its universal applica- "tion and use in all commercial transactions throughout the "commercial world. Again, that court says: The *law* "*merchant*, then, being a part of the common law of England, "and being of a general nature, and not local to that kingdom, "is comprehended in that clause of the statute which adopts "the common law. Our legislature adopted the common law "in the same terms in which it had been previously adopted in "Indiana, and we agree with that court that we adopted that "portion of the common law which comprehends the *law* "*merchant*, and that by the common law as thus adopted by

"us, a bill of exchange payable on a given day does not "mature till three days after the day appointed on its face for "its payment."

This statute was re-enacted in the revision of the laws of Illinois of 1874, page 268, under the head of "*common law* "rule of decision." And as said by Justice Dickey, speaking of this statute in *Thompson v. Weller*, 85 Ill. 198, — it was enacted as early as 1818, and declared that the common law and the statutes of the British Parliament in amendment thereof, "shall be 'the rule of decision,' *until repealed by* "*legislative authority*," and, as said by the learned judge, constitutes a part of the "foundation of our system of juris- "prudence."

The rule of decision as defined by the court in *Cook v. Remmick*, *supra*, has never been departed from; and this statute adopting the law merchant has never been repealed or abrogated by "*legislative authority*," as said in *Thompson v. Weller*, *supra*, and is therefore the rule of decision which must control with respect to the negotiability of commercial instruments, except where it has been *expressly* changed by statutory enactments.

It cannot be abrogated by *judicial construction*, as is most emphatically indicated by the learned judge in the case last cited; and whatever decisions may have been made by the Supreme court prior to the case last cited, holding that there is an *implied* want of power, in the absence of specific statutory authority, to make a city bond payable elsewhere than at the treasury of the city, must be deemed to have been

inadvertently made, without due consideration of the statutory provision above referred to.

As before remarked, it is too apparent to admit of argument that it was the intention of the city to give the bonds *all* the qualities of negotiable paper so they might be bought and sold in any money market. Hence they were made payable in New York, in accordance with the universal custom recognized throughout the commercial community in this country, as *the place* of payment above all others to give commercial value to such securities, and thereby necessarily subjected these securities to all the conditions of the law merchant—the commercial law of the country. This is strictly a question of general commercial law which this court has often, and very recently, had occasion to pass upon.

In *Oates v. National Bank*, 100 U. S. 246, it is said that "while the Federal courts must regard the laws of the "several states * * * as rules of decision in trials at "common law in the courts in the United States in cases "where applicable, they are not bound by the decisions of "those courts upon questions of general commercial law. "Such is the established doctrine of this court so frequently "announced that we need only refer to a few of the leading "cases bearing upon the subject," (citing *Swift v. Tyson*, 16 Pet. 1 and other cases.)

Again, the court says in this case: "We have already seen "that the Statutes of Alabama, placed under the protection "of the commercial law promissory *notes payable in money "at a certain designated place; but how far the rights of "parties here are affected by the rules and doctrines of that*

"*law is for the Federal courts to determine upon their own* "*judgment as to what these rules and doctrines are.*"

In *Railroad Company v. National Bank*, 102 U. S. 14, this court reviewed the authorities bearing upon this question, under the present statute, which is in substance a re-enactment of section 34 of the original judiciary act, and reaffirm the doctrine of *Swift v. Tyson* and cases following, particularly *Oates v. National Bank* (p. 28 to 32), and the opinion delivered concludes by saying: "To this doctrine, "which received the approval of all the members of this court "when first announced, we have, as our decisions show, "steadily adhered. We perceive no reason for its modification "in any degree whatever. We could not infringe upon it, in "this case, without disturbing or endangering that stability "which is essential to be maintained in the rules of a commer- "cial law. The decisions of the New York court, which we "are asked to follow in determining the rights of parties under "a contract there made, are not in exposition of any legislative "enactment of that State. They express the opinion of that "court, not as to the rights of parties under any law local to "that state, but as to their rights under the general commercial "law existing throughout the Union, except where it may have "been modified or changed by some local statute. It is a law "not peculiar to one state, or dependent upon local authority, "but one arising out of the usages of the commercial world. "Suppose a State court, in a case before it, should determine "what were the laws of war as applicable to that and similar "cases, the Federal courts, sitting in that state, possessing, it "may be conceded, equal power with the State court in the

"determination of such questions, must, upon the theory of "counsel for the plaintiff in error, accept the conclusions of "the State court as the true interpretation, for that locality, "of the laws of war, and as the 'law' of the State in the sense "of the statute which makes the 'laws of the states rules of "decision in trials at common law.' We apprehend, however, "that no one would go that far in asserting the binding force "of State decisions upon the courts of the United States, when "the latter are required, in the discharge of their judicial "functions, to consider questions of general law, arising in "suits to which their jurisdiction extends. To so hold would "be to defeat one of the objects for which those courts were "established, and introduce infinite confusion in their decisions "of such questions. Further elaboration would seem to be "unnecessary.'"

And in the separate opinion delivered by Justice Clifford (p. 57) the learned judge says: "State decisions, in respect "to titles to real estate and transfers of property, usually "furnish the rule of decision in the federal courts, by virtue "of the before mentioned provision of the judiciary act; but "the established practice is, that it does not apply, except in "matters of a strictly local character; that is to say, to the "positive statutes of the states, and in the interpretations of "the same by their own tribunals, including rights and titles "to things having a permanent locality, such as real property, "and that it does not extend to questions of general commer-"cial law, from which it follows, that where any controversy "arises as to the liability of a party to a bill of exchange, "promissory note, or other negotiable paper, in one of the

"federal courts, which is not determined by the positive words "of a State statute, or its meaning as construed by the state "courts, the federal courts will apply to its solution the general "principles of the *law merchant*, regardless of any local decision. "1 Daniel, Neg. Inst., 2d ed., Sec. 10.

"Transactions of a commercial character extend throughout the civilized world, and it is well known that they are "chiefly conducted through the medium of bills of exchange "and other negotiable instruments. Uniformity of decision "in a matter of great public convenience and universal necessity, acknowledged by all commercial nations. Should this "court adopt a principle of decision which, when carried into "effect, would establish as many different rules for the determination of commercial controversies as there are states in "the Union, it would be justly considered a public calamity, "as it must necessarily depreciate our negotiable securities in "all the foreign markets of the world, where our merchants "have commercial transactions.

"Stable and immutable rules are necessary to give confidence to those who received such securities in the usual "course of business. * * * Uniformity of decision in "such cases is highly desirable, and these observations are "sufficient to show that nothing is wanting to accomplish that "great object but the concurrence of a few more of the State "courts."

One or two more recent decisions of this court might be cited to the same effect, since published in the current law magazines (see *Chicago Legal News*, Jan. 22), which, as is

believed, have not appeared in the authorized reports of this court, to which the attention of the court is called.

It follows, therefore, that the bonds in question being payable in New York, their negotiable character must be determined by the law merchant.

(3.) As it was insisted in the court below, I suppose it will be again, that under the statute of Illinois with reference to negotiable instruments these bonds could not be negotiated without endorsement. This is simply a misapprehension.

Sections 3 and 4, chapter 73, R. S. of Illinois of 1845, entitled Laws and R. S. of 1874, p. 718, provides: § 3. "All "promissory notes, bonds, due bills and other instruments in "writing, made or to be made, by any person, *body politic* "*or corporate*, whereby such person promises or agrees to pay "any sum of money or articles of personal property, or any "sum of money in personal property, or acknowledges any "sum of money or article of personal property to be due to "any other person, shall be taken to be due and payable, and "the sum of money or article of personal property therein "mentioned shall, by virtue thereof, be due and payable as "therein expressed.

§ 4. "Any such note, bond, bill, or other instrument in "writing, made payable to any person named a payee therein, "shall be assignable, by indorsement thereon, under the hand "of such person, and of his assignees, in the same manner as "bills of exchange are, so as absolutely to transfer and vest "the property thereof in each and every assignee successively."

Notwithstanding this statute, which applies to all nego-

tiable instruments executed by any *body politic or corporate*, it was held by the Supreme court of Illinois, in *New Hope, etc. Bridge Co. v. Perry*, 11 Ills., as remarked by this court in *Roberts v. Bolles*, *supra*, that the statute *did not apply to bank notes*. Certainly bank notes fell within the letter of the statute, if it was intended to have the comprehensive application contended for on the other side, but the Supreme court of Illinois said it did not apply to such securities, but "*to instruments "that were not negotiable by the common law.*" In *Johnson Co. v. Stark*, 24 Ills. 75, and *Supervisors v. Hubbard*, 45 Ills. 139, the doctrine of the New Hope bridge case is emphatically endorsed.

As said in the Bolles case *supra*, by sec. 8 of chap. 98 (R. S. Ills. 718) instruments payable to *bearer* are made negotiable by delivery.

It is true there are some decisions of the Appellate court of Illinois which, notwithstanding this new section, adhere to the construction given in the early cases of *Hilborn v. Actus*, 3 Scam. 344, and *Roosa v. Cist*, 17th do. 450, and differ from this court in the construction placed upon this section in *Roberts v. Bolles*; but I am aware of no endorsement of the views of the Appellate court by the Supreme court of the State—the court of last resort.

It seems proper to say here, however, that the decisions of the Appellate court are not *authority*—even in that court—except in the identical cases in which they are rendered. By Sec. 3 and 4 of the act establishing the Appellate court (Laws Ills., 1877, p. 69,) it is provided that they shall file their "reasons" in writing for the reversal of cases, but if they affirm

them, it is immaterial—whether they are right or wrong—and whoever is affected by them will ever remain in blissful ignorance of the *reasons* of the court for its adjudication; and if defeated is denied even the cold comfort of knowing why; but, lest the general public should be injuriously affected by the "reasons" of the Appellate court, the concluding portion of the section last quoted enacts, "provided that the *reasons* "so filed shall not be of binding authority in any cause or "proceeding other than that in which they may be filed or "given."

(4.) It was urged upon the trial of this case in the court below, that the decision of the Supreme Court of Illinois in *Garvin v. Wiswell*, 83 Ills., must be taken as a square overruling of the preceding cases, (holding that municipal *bonds* payable to a person named or bearer were negotiable by delivery only). Such is not the effect of that case, as is apparent from the subsequent decision of that court in *Thompson v. Weller*, 85 Ills. 198, and so far as it supports any such inference it is overruled by the latter case; but an attentive examination of *Garvin v. Wiswell* shows that the construction contended for by our adversaries is not tenable. By the Illinois statute any absolute promise to pay money or other valuable thing or article of personal property is negotiable by assignment, so as to pass the *legal title* to the *instrument* to the assignee; but it by no means follows that every negotiable instrument is *commercial paper*, and governed by the law merchant. Clearly a note payable in wheat, corn, or other commodity would not be deemed commercial paper. If we adhere to the original interpretation of the statute given by

the court in the New Hope Bridge case, *supra*, viz., that it was particularly intended to embrace "instruments not negotiable by the common law or the custom of merchants," we have a reasonable solution of the matter. While this court is not bound to follow the decisions of the State court upon questions of commercial law, it certainly would not do so in cases where they are conflicting and inharmonious.

The instrument in *Garver v. Wiswell*, though spoken of as a "bond" by the judge in the delivery of his opinion, was really no *bond*, in the commercial sense of the term, as is apparent. It was issued without any authority of law whatever, there was no *special* act for its issue, and under the general law of the State, the county had no right to issue such evidence of indebtedness for any such purpose, viz., for bounties to volunteers. Nor in any case unless payable on demand. Such an issue could only be made under a special statute, as in *Taylor v. Thompson*, 42 Ills. 11. It was not a general promise to pay, but simply a county order payable out of a *particular fund*, viz., the fund appropriated (not voted by the people) for bounties. This provision, of itself, divested it of the quality necessary to make it commercial paper, viz., that it should only be payable out of this *particular fund*.

In the dissenting opinion of Mr. Justice Dickey, he says, "this paper is not *commercial* paper as is conceded in the "opinion." It was simply a county order or warrant — nothing more or less — as in the cases of *Wall v. County of Monroe*, 103 U. S. 74, and *County of Ouachita v. Wolcott*, *Ibid*, 559.

The courts throughout the country, with almost entire unanimity, endorse with approval the doctrine laid down by Dillon. (See Sec. 427 of *Dillon on Municipal Corporations*, defining the distinction between municipal bonds and county orders. See also *Newell v. School Directors*, 68 Ills. 544; *Turner v. R. R. Co.* 95 Ills. 134; *Mayor v. Ray*, 10 Wall.; *Baird v. Underwood*, 74 Ills. 176; *Hubbard v. Epling*, 81 Ill. 172, and numerous other cases.)

In *Town of Peoria v. Lloyd*, 97 Ills. 179, it was sought to enjoin a subscription and issue of bonds to the R. R. Co., for various alleged irregularities, with reference to the issue and delivery of the bonds. They were payable like those involved in the pending case, to the R. R. Co., "or to the "bearer hereof." (See p. 183.) They had passed into the hands of *bona fide* purchasers, not by *endorsement*, but by *delivery* only. Justice Mulkey, in conclusion, says (pp. 199–200):

"It is also claimed that the bonds in question were never "*delivered* to the Bloomington and Ohio River Railroad "Company, but were *delivered* to the Chicago and Paducah "Railroad Company. The facts are that these bonds, as voted, "are payable to the former company. They were *handed over* "by the agents of the township to P. B. Shumway, who, in "the receipt executed for them, professes to act on behalf of "the Bloomington and Ohio River Railroad Company, as well "as his own company, and there is nothing in the record to "show he was not authorized to do so. But even if it were

"admitted there was an improper delivery of them, by means "of which they passed into the hands of innocent holders, we "are not prepared to hold that the bonds would be void in "their hands. There was ample authority for issuing them; "they were executed in the proper form, and *made payable* "*to the proper party*, and there was nothing pertaining to "them, or could have been ascertained from the record, that "would have indicated they had been *delivered* to one not "entitled to receive them, and certainly, under such circum- "stances, it would be great injustice to the present owners to "hold them invalid.

"Upon the whole, we are of opinion that the decree of "the Circuit court is right, and it is therefore affirmed."

It is submitted that the prosecution of this case (to this court) in view of the decision in *Hackett v. Ottawa*, 99 Ill. 86, is wholly unwarranted, and that the judgments of the court below should be affirmed, with damages against plaintiff in error, for the reason that it is apparent that the case was prosecuted to this court for delay only, and that there is no meritorious defense to the case, it being nothing less than a shameless attempt by the authorities now controlling the city government to defraud the creditors of the city. If, however, your Honors should for any cause, deem it important in the determination of this case to re-investigate the questions as to what is a corporate purpose, as in the Hackett case, *for there is no question of corporate power involved*, your Honors are respectfully referred to the argument of counsel for the defendant in error in the case of *Ottawa v. Carey*, pending and herewith also submitted, that case being also upon some of the

same bonds and coupons issued by the city in pursuance of the ordinance recited upon the face of the bonds involved in this suit.*

G. S. ELDREDGE,

For Defendant in Error.

*An authenticated copy of the proceedings of the City Council, with reference to this case since the rendition of judgment in the court below will be filed herewith, in support of the suggestion that the judgment should be affirmed with damages.

108-110

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882.

WILLIAM H. CARY,
Defendant in Error,

vs.

THE CITY OF OTTAWA,
Plaintiff in Error.

ON MOTION FOR REHEARING.

ARGUMENT OF JOHN DEAN CATON,

Of Counsel with the Defendant in Error.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, 47 & 49 DEARBORN STREET.
1882.

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

WILLIAM H. CARY,
Defendant in Error,
ads.
THE CITY OF OTTAWA,
Plaintiff in Error.

ARGUMENT OF JOHN DEAN CATON,

Of Counsel with the Defendant in Error.

MAY IT PLEASE THE COURT:

I emerge from my retirement with great reluctance and upon what I consider an important occasion, and for which I think a word of explanation may be necessary. Nominally, I appear for the defendant in error; but, in fact, for an only child of a deceased friend who was left with a comfortable fortune, the income of which, it was supposed, would amply support her in the walk in life to which she was born. Almost her entire patrimony was, with the advice of her friends, invested by her uncle in these bonds without the remotest suspicion that their legality would ever be questioned by the city, upon whom her father had conferred many benefits.

After she attained her majority she sold a part of

these bonds for their par value to the defendant in error, and gave her personal guarantee for their payment, retaining twenty thousand dollars of the bonds which she still holds. I now, with a shudder, see this orphan child whose future looked so bright and whose prospects were so flattering, standing on the brink of financial ruin, by an act of repudiation, more graceless and damnable than any other which has ever come within my observation during a long professional and judicial life. I now feel that no more sacred duty is left me than to do what I may properly do to avert so great a calamity to one so innocent and so beloved.

I know that these considerations should have no place in a legal argument, and I invoke your Honors to entirely forget them when examining the dry question of law which I ask you to reconsider, but I deem it due to myself to make this personal explanation of the reasons which compel me once more to appear in a court of justice, which I do without fee or reward except that which arises from a consciousness of having performed a sacred duty, which I might in no wise omit. And it may be fitting that my last appearance should be before this high tribunal, the most exalted known to the judicial system of this Nation.

Craving the forbearance of the court for this personal matter, I will now address myself to the single question upon which the case was decided against us, and which I believe this court will be willing and even anxious to consider further.

That question is, did the consideration for which these bonds were issued, fail, and if so, shall the defendant in error suffer the consequences of such failure? The record shows that the bonds were issued

in obedience to a vote of the people, to aid in the improvement or development of the water power in and adjacent to the city in order to promote its general welfare.

I shall assume that they were legally issued and for a legitimate purpose. All of the recitals in the bonds were simple truths and misled no one, whether he was a stranger, or familiar with the antecedents which led to their issue. They were issued and were intended to be issued not to pay for work done, but to aid in the doing of work. They were issued before any work was done that they might furnish the means for doing the work.

It was the intention of all parties that they should be put upon the market in order to raise money with which to do the work. This is manifest not only from the circumstances of the case but from the lauguage of the contract which the city took from Cushman when it issued the bonds to him. The city authorities who where empowered to issue these bonds to aid in the construction of this work took a personal obligation from Cushman that he would thereafter do the work in a specified manner, in which contract it was provided that if he failed to do the work he should return the bonds *or their value.* This itself shows that it was contemplated that the bonds would not be locked up in Cushman's safe where they could in no way *aid* him in doing the work, but should be sold or hypothecated, to raise money which would aid him. It was designed, then, that they should be put in circulation, and all men, both citizens and strangers, invited to purchase them freely and without fear.

This invitation and promise was held out by the city to come and purchase these bonds

from Cushman, and in perfect confidence especially were its citizens who had money to invest, and who had the welfare of the city at heart, invited by all the circumstances which accompanied the issue of these bonds, to aid in what was thought to be a patriotic work, without the least intimation by word or circumstance that they were to become guarantors of Cushman that he would do the work.

The least intimation of this would have rendered the bonds valueless, and defeated the whole scheme at once.

The citizen who purchased these bonds, acted in just as good faith in fact as the stranger, and in morals, and I do not hesitate to say in law, is entitled to the same protection, otherwise the law itself becomes a snare and a delusion to entrap those who act from patriotic motives as well, and let those who purchased the bonds from mercenary motives alone escape.

The mistake I conceive consists in the conclusion that the consideration of these bonds consisted in the doing of the work, when in fact and in law it consisted in the promise—the covenant to do the work. Had the consideration consisted in the doing of the work or in the work itself, then they would not have been issued till the work was done.

The city issued the bonds and took Cushman's covenant to do the work, as simultaneous acts. Both became obligatory, and completely so, at the same instant. Suppose the city had paid Cushman the 60,000 dollars in cash from its treasury, in the presence of all its citizens, instead of these bonds, and he had turned around and paid it out to them in the presence of the city fathers, would these citizens have become his guarantors

to the extent of the amount each one received? And yet the payment was as absolute in this case as in the one supposed. These bonds are so likened to money that they are held by this court and by our own Supreme Court to pass by delivery and without the endorsement of the payee notwithstanding our statute requiring such endorsement to all notes, bonds and obligations for the payment of money or property in order to pass the title.

This payment was therefore more complete and absolute than would be a payment made by an individual by his note or bond for the performance of future covenants, because the payment was made in what is in law a circulating medium, and passes from hand to hand like government notes or promises or greenbacks as they are familiarly called, and yet I would not hesitate to ask this court to hold that an individual who gives his note for the performance of future covenants, the endorsee of such a note before due, and knowing for what it is given, does not become the guarantor of the endorser; that he shall perform his covenant, much less so in this case. A railroad company advances to a contractor its bonds to aid him in the construction of his work, who realizes on them as was intended he should.

Does every purchaser of the bonds, knowing for what they were issued, become the guarantor of that contractor to the amount of the bonds purchased? And so we might go through a long list of cases precisely like this in principle, or not so strong for the purchaser of the securities, and which will daily arise in the multifarious transactions of this progressive age, where this principle would introduce an element of uncertainty and distrust, the *mischief* of which would be beyond computation.

The great strides which commerce and the various other business transactions among men in this our day have compelled the courts, in order to keep pace with them, to break loose from many of the old iron-bound rules, which worked well enough with the limited transactions of former times, but which now would become an intolerable burden.

The enlightenment and the enterprise of the present day pervades the courts as well as the people, and the necessary tendency is to liberalize our views, to extend more freedom and confidence to business transactions; much, more, then will you refuse to fasten new fetters on the feet of commerce; much less will you introduce a principle, so far-reaching in its consequences which must introduce a new element of doubt, distrust and uncertainty among a class of transactions now so common and so important among business men, which will weaken, to say the least, a class of securities, the extent of which can hardly be computed.

Confidence and integrity constitute the very essence, yes, the life blood of commercial life, and the more these are upheld the more will public prosperity be promoted.

Conceding a total failure by Cushman to perform his covenants, then, undoubtedly, that would be a good defense to this action, had it been brought by him, not because of a failure of consideration, but because the city would have a right to recover of him for a breach of his covenants, precisely the same amount as the value of these bonds. This would be a proper case for the recoupment of damages.

This is an equitable relief which a court of law will administer, to avoid unnecessary law suits, and

to guard against the irresponsibility of the party liable for a breach of his covenants. But this liability does not attach to a third party, unless he has become a guarantor for the performance of the covenants which were given for the bonds. I have already endeavored to show that a purchaser of the bonds in the open market does not thereby become such guarantor, although he may have known for what purpose the bonds were given, and of the covenants into which Cushman had entered which induced the giving of the bonds, or in other words, was the consideration for which they were given.

Let me further add upon this point that courts will construe obligations according to the intention of the parties. Was there any intention on the part of the city when it issued these bonds, that any purchaser of them should ever become responsible for the fidelity or the responsibility of Cushman in the execution of his contract? Was there any intention on the part of Eames when he purchased these bonds that he thereby became bound to see that the contractor should faithfully execute his contract? Shall he or his assignee be held by construction and against his intention to be surety on a bond which the city, without consulting him, had accepted as satisfactory.

With what propriety can it be said that Eames was a *male fide* purchaser. How can any bad faith be imputed to him? To say so would be an abuse of terms. To the ordinary sense he acted in the utmost good faith and from the purest motives, and I think it must appear so to the judicial sense. True, he purchased with notice; but notice of what? Certainly of nothing which could admonish him that there might at any time be a doubt as to the legal

obligation of the city to pay these bonds, nothing which could have put him upon an inquiry which would have led to such a doubt.

But even admit that a failure of Cushman to perform his covenants was a failure of the consideration of the bonds, the record shows that there was but a partial failure. The dams were built, the races were dug though not completed, water power was furnished to a paper mill, which was all that was applied for so far as appears, and so it continued for a year or two, when great floods came and carried out the dams. All of the sixty thousand dollars, and no doubt much more, was spent in good faith in the execution of this work. This is made manifest by the record.

Here, then, was but a partial failure of consideration at most. To hold this party liable, not only for the act of God, in destroying these dams by great floods, but for Cushman's neglect to rebuild them, does look pretty hard. Ought not the city to bear this misfortune rather than throw it upon the shoulders of an innocent party whom it invited to buy its bonds, and the cash paid for them was expended by the agent or instrumentality selected by the city and not by the purchaser? The money was, in fact, expended under the direction of the city, and if it was not judiciously expended the city is more responsible for that than the purchaser of the bonds.

The bonds were issued without any guaranty to Cushman's covenant, and the city asked no security and never expected or intended that any one would ever become surety? This would indeed be making a contract for both parties and without their consent, and in violation of their intentions. This,

may it please the court, can not be the law. The city reposed confidence in Cushman. The city selected the agency for the disposal of the bonds and the expenditure of its money and judged of the sufficiency of the security which it took for the good judgment and fidelity and responsibility of that agent.

If confidence was betrayed it was the confidence of the city and not of the purchaser who never had occasion or an opportunity to depend in the least upon Cushman's judgment, fidelity or responsibility. Eames did not even buy the bonds of Cushman but of the manufacturing company. Although the payee, Cushman never even indorsed the bonds, so that he never trusted Cushman in the remotest degree, not even to the weight of a feather, while the city trusted him to every extent—as to his judgment, as to his fidelity and as to his responsibility.

Is it possible that this court will hold that the party who never had anything to do with the selection of Cushman to expend this money, who never had occasion or opportunity to pass upon his responsibility or judgment, who never, in any way, reposed confidence in him, is to be held responsible for any of his laches, while the party who did select him, who did repose confidence in him, and who judged of his responsibility, is to be exonerated from the consequences of its misjudgment.

Is this to be proclaimed as the highest law of this land? I do not believe it. If so, a new chapter is written in the law for the government of the relations among men. I took part in the trial of this cause in the court below, not because I thought it needed my assistance, but rather for a reason per-

sonal to myself which is explained in what I had to say in that court. I append a copy of that argument as a part of this and ask that it may be read. It will be seen that I argued but a single question, which was the only one upon which I thought any dispute could arise. If the question above considered was raised on that trial, it did not attract my attention, and I have entirely forgotten it.

As a citizen of Ottawa, I wish to vindicate myself from any sympathy with this act of repudiation, and against all repudiation of honest debts, as disgraceful and wicked in itself, and as sure to entail calamities upon all parties engaged in it or sympathizing with it, and so it must surely be in this case, let the final result be what it may. The fathers of the city have eaten sour grapes, and the children's teeth must surely be set on edge, and this calamity must continue until by some noble and honorable act they show that a change of heart has taken place in those who govern the city.

Indeed, I am happy to say that I see evidence that that change of heart has already taken place. The better and honest element has already prevailed. The repudiating council has been repudiated, and I have reason to believe that the present authorities would gladly pay these and all other honest debts, but their hands are tied by this decision. Will you not loose them?

Then this foul blot may be wiped out, and the finger of scorn will cease to be pointed at the passer-by with the remark, *he is from the disgraced city of Ottawa.* Then the citizens of Ottawa will not be ashamed to append their residence when they register their names. Then the old maxim that *corporations have neither bodies to be kicked nor*

souls to be damned, may cease to illustrate the conduct of those who govern the city of Ottawa, and disgraced their places by doing all they could to disgrace her citizens, and blighting her once fair prospects.

UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES,

FOR THE NORTHERN DISTRICT OF ILLINOIS.

BLODGETT, Judge, Presiding.

WILLIAM C. CARY,

v.

THE CITY OF OTTAWA.

Argument by Judge Caton, in behalf of the Plaintiff.

MAY IT PLEASE THE COURT:

Allow me, on this occasion, to come out from my retirement and seclusion, and appear before this court, more in behalf of my fellow citizens of Ottawa, and of myself, than of the plaintiffs in these cases, although in form I appear for them alone.

I propose very briefly to discuss a single question of law which arises in this case, and which, if I am right, disposes of every objection to the validity of these bonds, conceding everything else which can be urged against them, leaving all the rest of the case in the hands of my associate, Judge Eldridge, who has studied it with much more care than I have done.

The law is not an exact science, capable at all times of absolute demonstration, like a problem in mathematics, but largely depends upon the judgments of men which in our imperfection are liable to differ widely upon many questions. The question I propose to consider, however, I venture to say is capable of absolute demonstration, leaving no room for doubt or disputation.

Granting for the sake of this argument, and for that only, that Mr. Eames, when he purchased these bonds before they became due, knew that they were issued to aid an individual or a private company to erect dams and races to bring into use the great natural advantages existing in the waterfalls in the Fox and the Illinois rivers, within the city of Ottawa and in its immediate vicinity, I propose to show that it was strictly within the express powers granted in the city charter, to levy taxes and to borrow money for this purpose.

The provision of the Constitution which restricted the legislative power in chartering cities, towns, or other municipalities, to authorizing them to levy taxes or borrow money for municipal or corporate purposes only, is familiar to the court and to the bar, and I shall not stop to read it for it is not denied or questioned. In the first section of the city charter the Legislature authorized it, in the very language of the Constitution, to levy taxes and to borrow money for municipal or corporate purposes. Thus, in the very first section it exhausted its Constitutional powers in this regard. It conferred all this power upon the city to raise money which the Constitution allowed it to confer, in as broad language, and in almost the identical words of the Constitution, without qualification or limitation.

But it is said that in a subsequent section of the charter is an enumeration of specific powers which should be held to restrict the broad grant of powers in the first section. If there were restrictive words in connection with these enumerative powers, such as that no other powers should be exercised than those there enumerated, I grant it would operate as a qualification of the broad language used in the first section, but no such words of limitation are found.

But a few of the most common and usual powers are enumerated, leaving the hundred other emergencies or occasions when it would be necessary to expend money to promote or protect the good or well-being of the people of the city or municipality to be provided for under the broad grant of power in the first section. I will suggest one or two which circumstances render imminent at this moment. There are, in the city of Ottawa, two bridges across the Illinois river connecting the two parts of the city, in neither of which the city owns a dollar's interest, and yet in which its indirect interest is immense.

Upon these bridges, to a large extent, depend its trade, its commerce, and its manufacturing interests. One of these bridges is owned by several towns in the county, and the other by a railroad company. There is now more snow on the ground than there has been at one time before in the last forty years, and just below these bridges is an ice-gorge filling the whole bed of the river for a great distance. Past experience shows that should this snow go off suddenly, as with a warm rain, while that ice-gorge remains, these bridges must go.

Should the owners of these bridges ask the city

to assist them in blowing up this ice-gorge, as parties are doing a few miles below to save a bridge, would my learned friend on the other side, who wrote the opinion in *Taylor* v. *Thompson*, who there laid down so liberal and enlightened a definition of municipal or corporate purposes, advise them that blowing up ice-gorges are not among the enumerated powers in the charter, and therefore they must stand, with folded arms, on the bank of the river and see with a sigh those bridges, upon which so much of the welfare and prosperity of the inhabitants of the city depend, swept away?

If they point to the clause in the enumerated powers which authorizes the city to build and keep in repair bridges, he would say that means your own and not other people's bridges; besides I have become a strict constructionist lately, and do not think that protecting even your own bridge from a threatened danger, is either building or repairing a bridge, and so is not within the enumerated powers granted; again, a part of that city is in the river bottom, and was overflowed when the thaw occurred a week ago.

Should it be deemed necessary for the protection of that portion of the city to build a levee, they can only find authority to do so in the first section of the charter; for in the enumerated powers not a word is said about levees, and so we may suppose many contingencies, in which it might be of the greatest importance to raise money for objects not specified in the enumerated powers; so that at last we are driven back to the inquiry as to what are corporate or municipal purposes, or rather, whether the improvement of the water power in the immediate vicinity of the

city was a municipal or a corporate purpose, as mentioned in the Constitution and in the city charter, for we have seen that the language of the latter is as broad as that of the former, and, in fact, is identical with it.

Whatever might have been once said, that can be no longer considered an open question now. It has been so repeatedly and uniformly settled by the highest authority known to our system of government, that the Construction of these words is as conclusively settled as if that construction had been inserted in the Constitution itself. By repeated acts of the Legislature, the words municipal or corporate purposes embrace every object which may tend to promote the interest or well being of the inhabitants of the corporation, either directly or indirectly—whatever is for the good of that people—whatever will tend to promote or facilitate their mercantile, their manufacturing, or their social interests, the city may do, in the exercise of the powers conferred by the Constitution and the charter.

As under the Constitution the Legislature could confer no authority upon any municipality within this State which was not for the accomplishment of a municipal or a corporate purpose, whenever they have passed a law authorizing a municipality to do any act, they have construed these words in the Constitution and in this city charter to embrace such act, and whenever the Supreme Court has sustained such act, it has decided that such acts were for the accomplishment of municipal or corporate purposes. This is not only a necessary inference, but in every instance the opinions show that the court placed its decision upon the express grounds that

the things authorized to be done were municipal or corporate purposes within the meaning of the Constitution.

But it may be said that the passage of these special laws is a strong intimation that without them the legislature entertained a doubt of the authority of the municipality to do the acts. I should rather infer that it was the manifestation of a sort of mania for special legislation which had become so mischievous that the framers of the new Constitution found it necessary to prohibit it altogether. But in all the cases, so far as I am advised, where the Supreme Court has sustained these special laws, they were necessary to authorize the special acts to be done because the law creating the municipality did not embrace the broad grant of power which is embraced in the city charter of Ottawa, a power as broad as the Constitution authorized the Legislature to confer upon any municipality, either by general or special law.

If in the law creating the municipality, this grant of general power had been withheld, then, indeed, a special act was necessary to confer a power which had been withheld when the municipality was created. But whether this was so or not in all cases is of small moment, for the fact remains that whenever the Legislature has passed a law of any kind, conferring specific or enumerated powers upon a municipal corporation, they have construed this language of the Constitution, and held that such particular act was within its meaning, and the same is true of the Supreme Court whenever it has upheld such acts.

These acts of the Legislature and these decisions of the Supreme Court are familiar to this

court, and I shall not stop to read them, or even to enumerate them. I will venture the assertion, that in all of them which came before the Supreme Court, and were sustained by that court, the powers authorized and exercised were of a much more doubtful character than was the borrowing of money to improve this water power, which, had it been done, would have secured in the very heart of the city, the greatest and best secured water power in the State, except at Moline.

Had the object for which this money was borrowed been secured, not one of those who are now seeking to repudiate these bonds will deny that it would have placed that city in the front rank of the manufacturing places in the state; that millions of dollars would have before this been invested there in manufactories, while other dependent interests would have been proportionally augmented, and that the population as well as the capital of the place, instead of retrograding, would have more than quadrupled.

Not one of these repudiators will deny, nor will their representatives here deny, that no object of expenditure ever proposed for the city could have advanced its material interests so much as this would have done, had the work been accomplished for which the money was borrowed. If it was squandered or injudiciously expended by the chosen agent or instrument of the city, surely it was not the fault of the purchasers of these bonds, who freely advanced their money on the good faith of the city.

To say that this work, which all will admit would have so materially promoted the interest of the city, and of every citizen in it, was not a municipal or

corporate purpose, is a contracted view of the case by no means in harmony with that broad and enterprising sentiment which inspired these decisions of our Supreme Court, which held that whatever tended to advance the interests and welfare of the municipality or its inhabitants collectively, was a municipal or corporate purpose for which they might levy taxes or borrow money.

Who, after reading that masterly opinion in *Taylor* v. *Thompson*, which has been justly complimented by the Supreme Court of the United States, and of which the learned author and his posterity after him may well be proud, which holds, that to levy taxes or borrow money by a municipality to pay bounties to raise soldiers, is for a municipal or corporate purpose, would ever suspect that any sane mind would doubt that to improve this water power upon which so much of the future prosperity of the city depended, was not a municipal purpose?

Equally to the point is the case where it was held to be within the corporate powers of a municipality to raise money to secure the location of a state institution within its borders which belongs to the State, and for the benefit and use of the people at large, and in which the municipality or its inhabitants could receive only reflected benefits by the increase of its general business. Indeed, the object of all local improvements in cities and towns is to encourage and increase its business facilities and its business prosperity.

Thus are the objects of taxation increased and its revenues enlarged, and to accomplish these desirable ends was this money borrowed; and because it failed in accomplishing the object sought, that object was no less a corporate purpose than as if it had

been successfully carried out, and the great prosperity of the city thus secured. Had that been done we never should have heard of repudiation, no effort would then have been made by the city authorities to cast the consequences of their own bad management upon the innocent hands, who at their solicitation advanced the money to carry out the great purpose they had in view—I say innocent hands, for how could Mr. Eames, when he advanced this money, doubt for a moment that this was a municipal purpose, in the lights of the decision of *Taylor* v. *Thompson*, and the other decisions on the subject. To have doubted it would have been a reflection upon the integrity of our Supreme Court, which had thus lured him into a trap, but to ruin him. No, I will vindicate and defend the integrity of that court, here and everywhere, by the assertion that it will never invite people to make investments on the strength of its repeated decisions and then repudiate them. The city of Ottawa may repudiate, but our Supreme Court, never. And had I not the greatest respect for my friends on the other side, I should venture to consider it a piece of effrontery to ask your Honor to repudiate those decisions in order that you might perpetrate a great injustice. I feel justified in the belief that you will not do it.

I may be permitted here to say that I opposed this measure with what little influence I possessed, not upon the ground that I did not think the object strictly legal and most desirable, for of these I never entertained a doubt, but because I believed that the means proposed to accomplish the object would result, as it has done, in an utter failure, and that the taxpayers,—of whom I am one,

and not the smallest—would have to raise the money after it had vanished by bad management. I anticipated some complaints, but never repudiation.

There are many other important questions presented in this case, all of which I leave to my associate, who has studied them with much more care than I have, who will present them in a much clearer light than I could.

I pray your Honor to pardon me a few words upon the moral aspect of this case and upon the future of our city as connected with it.

I am a citizen of Ottawa, and I feel, as I think every citizen should feel, that every blot upon her honor or integrity is a stain upon my own, and I feel bowed down in shame and in sorrow at this effort to repudiate an honest debt.

This effort at repudiation in which failure will be a far greater blessing than success, will, at the least, imprint a deep stigma upon a city which stood fair and honorable and in which all her citizens felt a laudable pride, and which they were not ashamed to acknowledge wherever they went. Alas! this is so no more. Who will seek to become a citizen of a place with a tarnished name and a ruined credit? Who will separate the city from the citizen in this unfortunate affair? If the credit of the city is ruined, the credit of every citizen must be affected, though I hope not in an equal degree.

Let an emergency arise when our banks need assistance to help them through a crisis, and they must feel the pressure of the fact that they are located in a repudiating city, and that their patrons upon whom they must depend to meet their obligations are its citizens. If our merchants ask for credits in foreign cities they must give their resi-

dence as in repudiating Ottawa, and they will hasten to show, if they can, that they had no sympathy with this disgraceful transaction, and even then they will be looked upon with suspicion and will be credited, if at all, with great caution.

If a lawyer is to be employed there, the first inquiry of the client will be if his money when collected will be safe in hands stained with repudiation; and he must straightway deny the charge or try to wash off the stain with professional soap and water. The mechanic, too, and the manufacturer must suffer in their credit for the wrongs of the city which represents them, and is supposed to reflect the sentiments of the citizens. Who can foretell the far-reaching influence of this most deplorable transaction? Where now are we to look for an increase of population, of capital or of business? Will not such seek other places into which they may enter not under a shadow?

Far better would it have been, even with the gravest doubts of liability, nay, even with a decision of the Supreme Court that the bonds were absolutely void, to have recognized them, and made some satisfactory arrangement for their payment.

It is passing strange, with the history of our own State before him, that one man can be found throughout this broad land who will favor repudiation of even a doubtful public debt. You and I, sir, can well remember that history, for a part of it we were, and all of it we saw. In 1842, when Thomas Ford was elected to the executive office, we had a population of half a million people. We were groaning under a debt of fourteen millions of dollars, which had been absolutely squandered in a reckless system of internal improvements, and

there was nothing to show for it. Two seasons of ruined crops had reduced us to distress even for food and raiment. The great panic of 1837 was then bearing its bitterest fruit. Our banks had all failed, and their circulation in the people's hands had become worthless. Private debts were unpaid, and the necessaries of life were only obtained by barter. There was no money in the country, and it was literally impossible to collect the taxes, even sufficient to pay the postage on the public correspondence. A gloom like a pall had settled upon the whole community, while mutterings of despair were ready to break forth into a loud clamor of repudiation, which needed but the efforts of an active demagogue to give it voice. The interest on our bonds was two years unpaid. Immigration to the State had ceased, and farms had lost their value. Those who were seeking new homes in the west, either went around our State, or swiftly and silently swept across it, and settled in the fertile plains beyond the Mississippi, where there were no bonds to trouble them and no fear of oppressive taxation to drive them further.

At this supreme moment, God in his great mercy sent us a man for Governor who was courageous in his convictions of the right, wise in his judgment of measures to be adopted, and strong in the hearts of the people who well knew his unbending integrity, the purity of his life, and his glowing patriotism. Under his wise counsels measures were adopted which gave the people confidence in themselves, and inspired in their creditors a confidence in them. No one was asked to abate one cent of the principal or interest. Time only was asked and the interest was funded,

so that compound interest was paid. Confidence was everywhere restored, at home and abroad. The cloud which had rested upon our honor and integrity was blown away, and the bright sun of hope shone in upon us, which warmed all hearts to happiness, and all energies to activity. Immigration poured in upon us of the best class from all parts of the world. Farms assumed a high value and all property could be sold for cash. All the cities and towns in the State sprung up with an elasticity which showed that if they had been pressed down their vitality had not been destroyed. Behold, then, the picture as we now see it, and you and I, who have anxiously observed every phase of this transformation can appreciate it more than those who have only heard of the former and now see the present. We have a population six times as great as it was in Ford's time; our wealth has increased more than fifteen fold, and notwithstanding the vast sums which have been raised and expended in public improvements, on the last day of the last year the last dollar of our debt of every kind and form had been paid, with a rich treasury besides, and sources of income for the future nearly sufficient to support the State government without taxation. If a glow of pride animates our bosoms at this retrospect is it not just and right?

And now I would ask my fellow citizens of Ottawa if we are to throw away this rich inheritance of integrity and honor, step down from the proud platform so nobly constructed for every citizen of the State, and prostrate ourselves in the dust, which shall tarnish our names with dishonor, and retard

our material prosperity in a degree not to be computed—who will come to share our disgrace?

In closing this reference to the past of our State, allow me to say that Illinois has produced three great men, whose conspicuous services will render their names immortal, and which should be commemorated by enduring monuments, and to whom we owe a debt of gratitude that can never be repaid. The first was Edward Coles, who was Governor of Illinois in 1824, who saved the State from the black curse of African slavery then and forever. The second was Thomas Ford, who was Governor in 1842, and who saved the State from the scarcely less blighting curse of repudiation, and the third was Abraham Lincoln, who saved the Union from dismemberment, and the nation from destruction. Not alone either of them, for all were assisted and supported by other great men whose names should be scarcely less honored, but they were the great leaders in these great labors, whose talents and whose integrity led the people to these great accomplishments. In all time to come posterity should bow its head in gratitude whenever either of these names shall be spoken.

I may be pardoned one other example of public integrity and its fruits.

But a few years ago the city of Chicago found itself in financial embarrassment, with three millions and a half of script issued without the authority of law, and well known to possess no legal value. Like bold, honest men, without a whisper of repudiation, the common council levied a tax to provide for this illegal debt, and the whole population paid the tax cheerfully and anxiously, excepting just enough to take the question to the Supreme Court, where a discussion was reluctantly extorted that the

script was utterly void; yet it was paid, every dollar of it, with the cordial approbation of the whole community. See the consequence. She has a credit throughout the world on a par with that of the National government. Her four per cent. bonds are sought at a handsome premium. What an invitation is such a record to the immigrant who seeks to associate among honorable men? So has this city ever acted from the very beginning, and so I trust will she ever act, and so shall she prosper. Doubly proud may he be who has helped to do this. He may make the proud claim that he is not only an Illinoisan, but a Chicagoan. Thus, not only has the credit of Chicago been built up, but also of her individual citizens, and thus are the reflected benefits of honest dealing proved even greater than the direct, and to many the consciousness of doing right is the richest reward of all.

Let me now ask what would be her fate should Ottawa in some great emergency, upon which her very existence might depend, ask for a loan? Foreigners would turn their backs upon her, and what would be the reply when she appealed to her own citizens? Would Mr. Eames take her bonds again after this sad experience, after his own neighbors and the government of his own city have sought to cheat him out of the money he has advanced her with the hope of doing her a great good?

He who has done so much for the city, for many years, at least might have been spared this ingratitude, which is even more painful than the thought of the loss of the money itself. The Fans, the worst cannibals of Africa, only devour their enemies. They never put their friends and benefactors upon the spit. It will not be sweet music in our ears

when we apply for credit at home or abroad, or even for social recognition, to hear the inquiry made whether we belong to the cannibal tribe who devour their friends.

Would that I could speak to every one of my fellow citizens at once and to our municipal authorities. I would advise them, I would implore them, as they value the future welfare of a city possessing very many of the choicest advantages for the most extensive manufactories, to stop short in this wild, mad course, and retrace their steps as quickly as possible —acknowledge the debt and make such terms as they honorably can for its future payment. I would beseech them not to make the very name of our city a stench in the nostrils of all honest men, which must to a greater or less extent adhere to the garments of us all. Shall the time never come again when we may proudly claim to hail from that once fair city?

I desire to proclaim to the little world where my name is known, that I do not in the remotest degree sympathize with this spirit of repudiation, which would seek for technical reasons to refuse the payment of an honest debt which should be as binding upon an enlightened conscience as the most stringent laws. We are sure to find in the end that the violation of this law of right and justice carries with it even severer penalties than the violation of municipal law.

I would not make this appeal to my fellow citizens because I doubt our legal liability to pay these bonds, but I wish them to save of honor what may yet be left to save, for we shall surely want it in the future.

JOHN DEAN CATON.

108-110

Supreme Court of the U. S.

OCTOBER TERM. 1882.

No. 694.

THE CITY OF OTTAWA,
Plaintiff in Error,
vs.
WM. H. CARY.

Error to the Circuit Court of United States for the Northern District of Illinois,

Motion for leave to file a Supplemental Brief.

And now comes the defendant in error in the above entitled cause, by counsel, and moves the Court for leave to file a supplemental and additional brief in said cause.

FILLMORE BEALL,
On behalf of G. S. ELDREDGE,
Attorney for Defendant in Error

The reasons for this motion, are briefly as follows.

Inasmuch as counsel for plaintiff in error furnished no copy of their brief to defendant's counsel, prior to the submission of this case at the last term of this Court, under the rule, and as the case is apparently held under advisement, the attention of the Court is respectfully asked to the consideration of some additional suggestions as the propositions therein discussed, and some of the authorities therein cited, and to some cases not referred to by counsel for defendant in error, in the brief heretofore filed, and particularly to the case of *Wilson v. Ottawa Manufacturing Company et al.*, recently decided by the Supreme Court of the State of Illinois, and not yet officially reported, a certified copy of which, together with the decree of the Circuit Court of La Salle county, appealed from, and affirmed by the decision of the last cited case, are filed with this motion.

Notice.

To plaintiff in error, or Lawrence, Campbell and Lawrence, its attorneys.

Gentlemen, take notice, that on the first day of the next term of said court, upon the opening of court on that day, or as soon thereafter as counsel can be heard. a motion will be made on behalf of defendant in error, for leave to file a supplemental and additional brief in said cause.

Dated September 23, 1882.

G. S. ELDREDGE,
Attorney for Plaintiff in Error.

STATE OF ILLINOIS, } ss.
LA SALLE COUNTY. }

G. S. Eldredge, being duly sworn, says: That on the 23d day of September, A. D, 1882. he deposited in the post office at Chicago, Illinois, a copy of the foregoing notice in writing, enclosed in an envelope, postage prepaid, addressed to Messrs. Lawrence, Campbell and Lawrence, (the attorneys for the plaintiffs in error, Honore building, Chicago; Illinois, that being their post office address.

G. L. ELDREDGE,

Subscribed and sworn to before me, this 27th day of September, A. D. 1882.

LORENZO LELAND, JR.,
Notary Public.

Notice of Filing of Opinion of Supreme Court of Illinois.

To Messrs. Lawrence, Campbell and Lawrence, attorneys for plaintiff in error.

Take notice—that in support of the application to file an additional brief in this case, there will be filed and submitted to the court, on the first day of the next term thereof, a certified copy of the decree rendered by the La Salle County Circuit Court in the case of Wilson et al. versus The Ottawa Manufacturing Company et al., and of the opinion of the Supreme Court of Illinois, rendered on the 21st day of June, 1882, affirming said decree, with a printed copy of which is herewith inclosed.

Yours respectfully,

G. S. ELDREDGE,
Attorney for Defendant in Error.

STATE OF ILLINOIS, }
LA SALLE COUNTY. } ss.

G. S. Eldredge, being duly sworn, says that on the 27th day of September, A. D. 1882, he deposited in the post office at Ottawa, Illinois, addressed to Messrs. Lawrence, Campbell and Lawrence, Honore building, Chicago, that being the post office address of counsel for plaintiff in error above named, postage paid thereon, a notice of which the foregoing is a copy, together with a printed copy of the decree rendered by the Circuit Court of La Salle County, Illinois, and the opinion of the Supreme Court affirming the same, of which the annexed are copies. That a petition for rehearing the said cause in the Supreme Court of Illinois was filed by one of the several parties thereto, which was not finally decided by said court until the 19th instant, and that affiant caused the decree an dopinion to be printed, and a copy thereof sent as aforesaid as soon thereafter as was practicable to be done.

G. S. ELDREDGE.

Subscribed and sworn to before me this 27th day of September, A. D. 1882.

LORENZO LELAND, JR.,
Notary Public.

FILLMORE BEALL,
On behalf of G. S. ELDREDGE,
Attorney for Plaintiff in Error.

694

108-110

IN THE

SUPREME COURT of the UNITED STATES

October Term, A. D. 1882.

THE CITY OF OTTAWA,
Pl'tff in Error,

v.

WILLIAM H. CARY,
Def't in Error.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

G. S. ELDREDGE,
FOR DEFENDANT IN ERROR.

CHICAGO:
BEACH, BARNARD & CO., PRINTERS, 104 RANDOLPH STREET.
1882.

IN THE

SUPREME COURT of the UNITED STATES

October Term, A. D. 1882.

THE CITY OF OTTAWA,
Pl'tff in Error,

v.

WILLIAM H. CARY,
Def't in Error.

Supplemental Brief on Behalf of Defendant in Error.

Inasmuch as counsel for plaintiff in error furnished no copy of their brief to defendant's counsel prior to the submission of this case at the last term of this court, under the rule, and as the case is apparently held under advisement, the attention of the court is respectfully asked to the consideration of some additional suggestions as to the propositions therein discussed, and some of the authorities therein cited, and to some cases not referred to by counsel for defendant in error, in the brief heretofore filed, and particularly to the case of *Wilson* v. *The Ottawa Manufacturing Company et al.*, recently decided by

the Supreme court of the State of Illinois, and not yet officially reported, a certified copy of which, together with the decree of the Circuit court of La Salle county, appealed from, and affirmed by the decision of the last cited case, and hereto attached.

I.

The plaintiff in error insists that the judgment of the Circuit court in this case should be reversed for the following among other reasons:

(1.) Because the bonds and coupons involved were not negotiable by delivery. This question is effectually disposed of by the decisions of this court in *Roberts* v. *Bolles*, 101 U. S., 119, and in *Ottawa* v. *The Portsmouth National Bank*, decided at the last term of this court, and submitted with the pending case.

(2.) Because the purpose for which the bonds were issued was not a corporate purpose.

This question was somewhat elaborately discussed in the brief submitted by defendant in error at the last term of this court. (See pages 1–25.) In addition to the authorities there cited, the attention of the court is further called to the case of *Livingston County* v. *Darlington*, 101 U. S., 407. This case was intended to be referred to before, but was inadvertently overlooked in the hurried preparation of a brief to be filed within the time prescribed by the rule of the court. After delaying its preparation, to obtain a printed copy of the record, and a view of the brief of plaintiff's counsel, until the time had nearly expired, and for want of time the brief was in fact prepared witnout an opportunity of seeing the printed

record of the case, and submitted, as before stated, without seeing to the brief of counsel for plaintiffs in error.

In *Livingston County* v. *Darlington*, *supra*, the whole subject as to what is a corporate purpose, within the interpretation of that term, as given by the Supreme court of Illinois, in construing the constitution of that state, was fully considered, and the authorities bearing upon the question elaborately reviewed, from the early case of *Taylor* v. *Thompson* down to the present time. In *Taylor* v. *Thompson* it was held "that a tax for a corporate "purpose is a tax to be expended in a manner which "shall promote the general prosperity and welfare of the "municipality which levies it. * * * And if it ap- "pears that a tax has been voted and levied with an "honest purpose to promote the general well being of "the municipality, and was not designed merely for the "benefit of individuals or of a class, its collection would "not be stayed by the courts."

The general power of the city of Ottawa to borrow money and issue bonds, as stated by Mr. J. Harlan, in *Hackett* v. *Ottawa* (99 U. S., 93), is without limitation as to the amount or purpose for which the same might be done. As stated by the learned justice in that case, "it is "clear that the council, having secured the consent of the "requisite majority of voters, might rightfully borrow "money upon bonds of the city *for every purpose which* "*could fairly be deemed municipal or corporate.*"

While this court in that case declined to place its decision upon the sole question of a corporate purpose, it is, nevertheless, said that "in view of the course of de- "cisions in Illinois, we should hesitate to declare that "money borrowed by the city of Ottawa to be expended "in developing its *natural resources for municipal pur-*

"*poses*, was not in the sense of the constitution of 1848, "as interpreted by the Supreme court of that state, ex- "pended 'to promote the general prosperity and welfare "of the municipality.'" (Page 94.)

The decree in *Wilson* v. *The Ottawa Manufacturing Company et al.* finds from the evidence in that case (as was admitted by demurrer in *Hackett* v. *Ottawa*, *supra*, and found by the United States Circuit court in the case at bar), that by an ordinance adopted by the city on the 15th day of June, 1869, entitled "An ordinance to pro- "vide for a loan for municipal purposes," the *mayor of the city was authorized* to borrow in the name of the city a sum not to exceed $60,000 (not to aid the Ottawa Manufacturing Company, but, as found by the Circuit and Supreme courts of the state, and by the United States Circuit court), "*to be expended in developing the* "*natural advantages of the city for manufacturing pur-* "*poses.*" That in pursuance of the ordinance of the 30th of July, 1869, entitled "An ordinance to carry into effect "an ordinance of June 15, 1869, the said city of Ottawa "caused to be issued bonds of said city to the amount of "$60,000, for the purposes aforesaid, and provided that "said bonds should be placed in the hands of William H. "W. Cushman, to be by him expended for the purposes "*aforesaid*," in the improvement of the water power in the Illinois and Fox rivers within the city, or in the im- "mediate vicinity thereof," in pursuance of the identical agreement recited in the ordinance of the 30th of July, 1869 (see Rec., 33, and the agreement with Cushman embodied in the seventh finding of the United States Circuit court, see Rec., 35–6; also see printed copy of decree in LaSalle Circuit court (pages 7 and 8).

The decree (see printed copy, pages 8 and 9) further

recites, as found by the United States Circuit court, that Cushman executed his bond to the city for the performance of the conditions contained in his contract, and that upon the execution thereof, the bonds were delivered to him. (See page 9.)

This decree further finds that subsequently, in February, 1871, Cushman, with the knowledge and consent of the city, delivered the bonds to the manufacturing company; which company thereupon assumed the completion and performance of the conditions of Cushman's contract with the city, and placed the bonds in its treasury, and that they were thereafter sold by the company and converted into money. This fund was distributed among a portion of the stockholders of the corporation, and the bill in that case was filed for the purpose of subjecting these parties, who thus appropriated this portion of the corporate funds of the company to the payment of the judgments recovered against the company by the complainant.

A copy of this decree is filed for the purpose of indicating with certainty the force and effect of the decision of the Supreme court of Illinois in *Wilson* v. *The Manufacturing Company*.

It will be seen from the copy of the opinion in this case, that the Supreme court of Illinois, in affirming the findings and decree of the Circuit court, took precisely the same view of the corporate power of the city of Ottawa to issue the bonds in question that was taken by this court in *Hackett* v. *Ottawa*, *supra*.

Mr. J. MULKEY, after reciting the facts, says (see printed opinion, *Wilson* v. *Ott. Mnfg. Co.*, page 22): "That the city council of the city of Ottawa having the "requisite power for that purpose, on or about the 15th of

"June, 1869, issued, in the name of the city, $60,000 in "bonds, which were delivered to the said William H. W. "Cushman, to be by him expended in the improvement of "the water power afforded by the Illinois and Fox rivers, "by building dams across the same, *the city taking from "him at the time an indemnity contract*, by which he "bound himself to either construct the dams in a reason- "able time, or refund the bonds or their proceeds, or "otherwise keep the city harmless with respect to their "issue. That Cushman, on or about the 2d of February, "1871, with the assent of the city, delivered the bonds "in question to the Ottawa Manufacturing Company, and "that company thereupon entered into a bond by which "it assumed the performance of Cushman's contract with "the city; that upon this delivery of these bonds to the "company, or shortly thereafter, the directors of the com- "pany issued stock, representing the same to the following "named persons," etc. (See printed copy of opinion filed herewith, pages 21–23.)

It will be thus seen that it was held, in accordance with the decision of this court in *Hackett* v. *Ottawa*, that the city had:

(1.) Corporate power under its charter to issue bonds for any purpose beneficial to the general welfare of the community.

(2.) That the bonds in question were issued for legitimate municipal purposes.

(3.) The "donation," as it is termed, was not a *donation* in the popular sense of the term, but an appropriation of $60,000 for the improvement of the natural resources of the city for manufacturing purposes, by erecting dams across the Illinois and Fox rivers, in pursuance

of a contract with Cushman, the performance of which, by him, was made *the consideration* for the issue of the $60,000 of bonds—the work which was undertaken to be performed by him and which was deemed by the city to be for the general benefit of the citizens, as the contract with Cushman (set out in the 7th finding of the United States Circuit court) recites that Cushman was to construct a good and substantial dam across the Illinois river above the city, sufficient so as to bring into use all the available water power of said river at Ottawa, and also construct sufficient head and tail races to make such water power available, and by uniting them with the waters of the Fox river, "*as fast as the same might be re-*
"*quired for actual use, and as fast as the water power* can
"be leased at fair and reasonable rates; * * * and
"whenever the said water power, made available by the
"construction of said dam across said river, can be leased
"at fair and reasonable rates; so as to have all the avail-
"able water power of both rivers at Ottawa ready for
"use as rapidly as called for." The said Cushman also binds himself, to and with the said city, "that in case said
"work is not performed to the extent of constructing a
"dam across the Illinois river and races to make water
"power thereby created available for practical use, that
"he will return said bonds, or the value thereof, to the
"city, and save and keep harmless the said city from all
"loss on account of the same, * * * and in case the
"work shall be performed to the extent above indicated, but
"shall *not be completed by the construction of all the dams*
"*and races heretofore specified, then said Cushman shall*
"*return to said city a pro rata share of said bonds, or the*
"*value thereof, in proportion that the cost of the work con-*
"*structed shall bear to the cost of that part* of the work
"not constructed."

It is further provided in the contract "nothing in this "contract, nor in the ordinances therein referred to, shall "give the said city any right, title, interest or ownership "whatever in law or in equity in the said improvements, "when completed, according to the conditions and stipu-"lations herein contained."

Mr. J. MULKEY, in *Wilson* v. *The Manufacturing Co.*, further says (see printed copy of opinion, page 29):

"They (the bonds) were clearly given to him to be ex-"pended, as they subsequently were, by the company in "building the dams across the two rivers. His liability "under his contract with the city on account of the bonds "was merely contingent, and absolutely ceased when the "bonds were thus used and the dams completed. Cush-"man turned over the bonds to the company to be used "in the manner they were, in consideration that the com-"pany would indemnify him against all liability on ac-"count of his contract with the city, which the company "did. * * * * The actual transaction between the "parties, when relieved of the little mist which the argu-"ment of counsel throws around it, is simply this: The "city of Ottawa made a donation of $60,000 in bonds, "to be applied in building dams across the Illinois and "Fox rivers, and these dams were built by the company, "and the funds faithfully applied to that purpose, and "Cushman and his confederates have received the value "of the bonds in the company's stock."

It will be thus seen that there was no connection whatever, and there was never intended to be any connection between the city of Ottawa, in its municipal capacity as a stockholder, and the Ottawa Manufacturing Company as a private corporation.

The ordinances and the contract with Cushman, both guardedly avoid the creation of any such relations.

It further appears that the appropriation of this $60,000 was not a *gratuity* on the part of the city to the manufacturing company, as has been assumed, but was founded upon this express consideration, viz: The erection of dams, by which the natural resources of the city for *general manufacturing purposes* might be promoted, and the water power made available for "general use," by being leased at reasonable and fair rates to all the citizens who might desire to avail themselves of the natural facilities for carryiny on various *industrial pursuits* which might be thus rendered "available" by the construction of the dams.

The term "*donation*" as applied to such appropriations, does not *ex vi termini*, imply *gratuity;* thus in *Goodman* v. *Beloit*, 21 Wis., 686, it was held that the "donation" of $1,000 to the plaintiff for the use of a bridge over the river at a certain point in the town, provided the plaintiff would, by a day named, erect a substantial bridge over the river at that point, *must be intended to mean an agreement founded upon a sufficient consideration*, and not a gratuity.

Here we have all the elements necessary and usually found in a contract containing mutual obligations for the accomplishment of a desired purpose, mutually advantageous to the parties thereto.

As has been before suggested, the bonds were simply issued to provide the means to effectuate a general purpose, deemed beneficial to the entire community, which object it was proposed to effectuate through Cushman's instrumentality under a contract with him, *upon the faith of his personal responsibility.*

As stated by this court in *White* v. *R. R. Co.*, 21 How., 575, where a municipal corporation has express or implied power to accomplish a general purpose, it has the right, unless specially restricted, to create a debt by the issue of bonds for its accomplishment. It has an implied power to create a debt, whenever necessary to carry out an express power conferred with respect to such contracts; it is to be regarded *quo ad hoc*, a private corporation. (See also *City of Galena* v. *Corwith*, 48 Ill., 423.)

II.

Again, it is earnestly insisted that, conceding the purpose for which the bonds were issued was a corporate purpose, they should have been issued by the authority of the board of commissioners specifically appointed by the act of the legislature of February 19, 1867, set out in the second finding of the Circuit court, on page 29 of the printed record in this case.

This act, as suggested on page 10 of the original brief filed by defendant in error, in this case, was a mere futile attempt on the part of certain persons interested in this manufacturing company to create a debt *in invitum* against the city of Ottawa, and so manifestly unconstitutional and void, that it was deemed sufficient simply to call the attention of the court to the authorities bearing upon the question of the unconstitutionality of this act. (See page 10 of the printed brief of defendant in error.)

It will be observed that by section 1 of this act the legislature assumed to create certain parties, who do not even appear to be citizens of Ottawa, commissioners to subscribe $100,000 on behalf of the city, to the stock of

this manufacturing company, and by section 2 they are authorized to make, execute and dispose of bonds on behalf of the city, to raise the necessary funds to pay such subscription.

By section 3 it was assumed to direct that the city should levy a tax to discharge this indebtedness, upon the requirement of the commissioners.

By section 4 it is provided how they shall be organized and what officers they shall appoint, etc.

By section 5 the commissioners were authorized to dispose of the stock and do various other things entirely independent of the control of the municipal government of the city. They were thus assumed to be created a close corporation, over which the city had no more control, except to compel the treasurer thereof to faithfully discharge his duties prescribed by the board, than it had over the board of supervisors of the county.

Not content with creating these commissioners a close corporation, the 4th section authorizes them to appoint *a proxy* to represent them in voting upon the stock so proposed to be subscribed for.

Nevertheless, surprising as it may appear, the distinguished senior counsel for the plaintiff in error (Judge Lawrence) who for may years was an honored member of the Supreme court of the State of Illinois, has vouchsafed an endorsement of the validity of this monstrosity in the way of legislation, and with great earnestness has devoted some twenty-four closely printed pages of his brief (viz, 64–88) to the maintenance of the proposition that these bonds should have been issued by authority of the commissioners, assumed to be created by this unconstitutional act, in the face of some eight or ten decisions

of the Supreme court of Illinois, made mainly while he was a member of that court, uniformly holding such an act to be unconstitutional and void.

In view of the extraordinary position now assumed by the learned counsel and his numerous associates, it is believed that a more particular reference to the cases cited on page 10 of the defendant's original brief, is justifiable.

In *Howard* v. *St. Clair Drain Co.*, 51 Ill., 130, an act was passed for the construction of a levee in St. Clair county—five persons were *named in and apointed by the act commissioners* to construct the levee, etc.

By a subsequent act these commissioners were declared a body corporate, with perpetual succession, etc. (to drain a certain district covering a portion of two counties), with authority to assess an annual tax of $20,000 upon land in the designated district, in proportion to the benefit supposed to accrue, etc.

There was no submission of this act to the people, who had no voice in the control of the company or the selection of its officers.

The learned senior counsel, in delivering the opinion of the court on page 133, says: "The mere statement of "the substance of this extraordinary legislation would "seem almost sufficient, of itself, for a disposition of this "case, but we will briefly declare the grounds upon "which this tax must be held illegal.

"The fifth section of the ninth article of our constitu- "tion (Constitution Illinois, 1848) provides that the cor- "porate authorities of counties, townships, school dis- "tricts, cities, towns and villages may be vested with "power to assess and collect taxes for corporate "purposes; such taxes to be uniform in respect to

"persons and property within the jurisdiction of the "body imposing the same. * * * * This case pre- "sents the question whether it was not also intended as a "limitation upon the power of the legislature to grant the "right of corporate or local taxation to any other persons "than the corporate or local authorities."

Without expressing an opinion as to the right of the legislature to create a district for special purposes in portions of contiguous counties, or on the right to impose a corporate tax for a corporate purpose, nevertheless the learned judge says (page 134): "We are clearly of the "opinion that this clause does forbid the legislature to "grant the power of such local and corporate taxation to "any other persons than the local or corporate authori- "ties; under our constitution the right of taxation cannot "be granted either to private persons or private corpo- "rations."

The learned judge then proceeds to say (p. 134), "that "the reasons for this are two-fold—that this clause was "not in the former constitution, yet the right of the legis- "lature to vest in municipal corporations the power of "taxation for local or corporate purposes was constantly "exercised, and the clause was therefore not inserted in "the constitution of '48, as a necessary grant of power or "to remove a doubt as to its existence," but, he continues, "it is therefore a just inference that its purpose was to "define the class of persons to whom the right of taxation "might be granted, and the purpose for which it might "be exercised, and when the legislature seeks to grant "it to *any other than corporate authorities* or for corporate "purposes, it transgresses the limit of its power.

"If the clause in question was not designed as a limita-

"tion of power, no reason can be given why it was in-
"serted in the constitution at all."

It will be observed that under the act creating commissions to incur the debt in behalf of the city of Ottawa, they are in substance authorized the levy of a tax for its discharge; the munincipal authorities performing simply the ministerial duty of attending to the details of the extention of the tax and its collection from the property owners. The drainage act was held void.

Again in *Lovingston Weider*, 53 Ill., 303, where the legislature authorized the establishment of a police force for the city of East St. Louis and for the appointment by the governor of three commissioners to control the department, who were authorized to estimate the sum necessary to be raised each fiscal year to maintain it, and certify the same to the city council, who were required to provide for the discharge of the same by the issue of certificates, receivable in payment of said taxes.

A bill was filed to restrain this proposed action of the commissioners. The same learned judge, in delivering the opinion of the court, said (p. 304) that "the validity of "this act can hardly be considered an open question in "this court since the decision of *The People* v. *Mayor of* "*Chicago*, 51 Ill., 17; *Same* v. *Soloman*, id., 37; *Same* v. "*Chicago*, id. 58, and *Harward* v. *St. Clair Drain Co.*, "id., 130." It is further said by the learned judge (referring to the foregoing cases), "we further held that by "*corporate authorities* as used in this clause of the con-"stitution, must be understood *those municipal officers who* "*are either directly elected by the people of the municipality* "*or appointed in some mode, to which they have given their* "*assent*, are further held, in the first of the above cited "cases, that *the commissioners of Lincoln Park were not*

"*corporate authorities*, and in the last case, *that the drain-*
"*age company were not such authorities* within the mean-
"ing of the constitution. These cases, in our judgment,
"are conclusive against the validity of the act under con-
"sideration. * * * They (the commissioners) are
"not elected by the people of that city, nor appointed in
"any mode to which the people have given their assent.
"* * * By the act in question *they are forced upon*
"*the people of this municipality.*

"It is said by counsel for appellees that the act in ques-
"tion is not open to this objection, because it does not
"give the police commissioners the right to impose a di-
"rect tax; but (like the act creating the commissioners
"who imposed the debt on the city of Ottawa *in invitum*)
"it does the same in substance. It authorizes them to
"issue certificates of indebtedness which are made re-
"ceivable in payment of all taxes or debts due the city,
"and, by the amended act of 1869, are convertible into
"city bonds on demand of the holder."

That act was also held unconstitutional and void.

In harmony with the foregoing is the case of *The People* v. *Mayor*, 51 Ills., 17, which involved the validity of an act of the legislature requiring the mayor, etc., of Chicago to issue bonds on the requirement of the park commissioners for the improvement of Lincoln park.

It was held that no such power could be constitutionally exercised. That the legislature could not compel the city to incur a debt without its consent; and further, section 12 of article 4 of the constitution of Illinois, 1848, ~~which~~ provides that "the governor shall nominate, and by "and with the advice and consent of the senate * * * ap-"point all officers whose offices are established by this

"constitution, or which may be created by law, or whose "appointment are not otherwise provided for; *and no* "*such officer shall be appointed or elected by the general* "*assembly*." Hence the court say (page 32-3): "We "do not think it is within the constitutional competency "of the legislature to delegate this power to these com- "missioners * * * . We fail to perceive any real dif- "ference, in principle, in forcing this burden upon the city, "and imposing a like burden by the direct action of the "legislature upon individual property owners within it; for "in both cases the debt, at maturity, must be paid by such "holders, while the accruing interest is a constant "drain upon their resources."

In *The People* v. *Solomon*, 51 Ill., 37, under an act of the legislature, a board of commissioners was constitutionally *appointed by the governor* and confirmed by the senate, and authorized to transmit an estimate of the amount necessary to be raised to pay bonds issued by the board. The distinction between the powers of these commissioners, lawfully appointed under the constitution, and of those assumed to be appointed by an act of the legislature, as in *Gage* v. *Graham*, *People* v. *Mayor*, *&c.*, *supra*, is pointed out very plainly by Mr. J. BREESE (p. 51), where he says: "The manifest distinction, in "brief, between this case, and that relating to Lincoln Park, is this: in that case, the legislature undertook to "compel the people of Chicago to incur a debt without "the consent either of the people of the city, or of their "corporate authorities; for it is impossible to hold that the "commissioners of that park were corporate authorities "of the city of Chicago. In this case, the people of these "three towns, by voting for the law, have made the com- "missioners corporate authorities of such towns, and em-

"powered them to assess the requisite tax upon the "property of the towns. The tax is really self-imposed "by means of agents not directly named by the people "of those towns, *but named by the governor by virtue of "authority conferred by their vote.*"

Gage v. *Graham*, 57 Ill., 144, endorses fully the doctrine of the foregoing cases.

This case was a bill filed to enjoin special assessments levied by the drainage commissioners of Cook county.

After a review of the facts and some of the cases before cited, the court say (p. 147): "It will be perceived "that these officers are not elected or appointed with the "assent of a municipal corporation, nor with the assent of "the persons to be taxed or assessed. *They are appointed "by the legislature and organized into a private corporation.*"

See also *Hessler* v. *Drainage Com.*, 53 Ill., 105, to the same effect, in which the court say (p. 113):

"The act in question was never in any mode submitted "to a vote of the inhabitants of the district embraced in "the bill, and the property holders who are to be taxed, "have no voice in the control of the company, the selec-"tion of its officers or the imposition of a tax. * * * "*By the term 'corporate authorities,' must be understood "those municipal officers who are either directly elected "by the population to be taxed, or appointed in some "mode to which they have given their assent.*"

To the same effect see *People* v. *Chicago*, 51 Ill., 58.

The doctrine of the foregoing cases was also pronounced in the following cases:

Marshall v. *Silliman*, 61 Ill., 218.

The Town of Middleport v. *Ins. Co.*, 82 Ill., 562.

Barnes v. *Town of Lacon*, 84 Ill., 561.

C., B. & Q. R. R. Co. v. *Aurora*, 99 — 205.

Cairo, &c., R. R. Co. v. *City of Sparta*, 77 Ill., 505.

In the last cited case it was held that when a municipal corporation submits an unauthorized proposition to issue its corporate bonds and which is carried, but which therefore imposes no liability on the corporation, it is not within the constitutional power of the legislature to validate such vote so as to compel the issue of the bonds voted. Under such a law the municipality might issue its bonds if it so desired, but cannot be compelled to do so.

III.

The fourth point urged by counsel for plaintiff in error (see page 89 of their brief), is simply a suggestion that there was a failure on the part of Cushman to comply with his contract by the construction of sufficient dams to bring into use "all the available waters, etc.," cannot be seriously entertained.

The proposition that if A contracts with B to build a house in accordance with certain specifications, and gives his note to B as a part of the consideration for the improvement to be constructed, and B should immediately thereafter and before maturity sell A's note for its face value to C, who, at the time, knew all about the consideration, a recovery could not be had by C on the note if B failed to perform his contract, is not tenable.

It is submitted that there is no known rule of law which could defeat a recovery upon the note in the hands of C or his assignees, because of a subsequent failure of B to perform his contract with A.

IV.

The fifth proposition presented by counsel for plaintiff in error (see brief, page 91), of course, rests entirely upon their ability to maintain their third proposition, founded upon the unconstitutional act of the 19th of February, 1867, which has just been considered, and it is urged that there can be no valid recovery, because the bonds in question were issued directly to Cushman, as is assumed, for delivery to the manufacturing company. This assumption, however, has no foundation in fact.

It will be seen by the third finding of the Circuit court (Rec., 30), that after the organization of the commissioners (assumed to be created by this unconstitutional law), the city council, then undoubtedly acting upon a misapprehension as to their legal powers in the matter, took some steps toward securing some subscriptions to the capital stock of the manufacturing company. This was long prior to the adoption of the ordinance on June 15, to wit, on the 11th of May, 1869 (see fifth finding, per Record, page 35), but it is apparant that the city council, being advised, undoubtedly, of the illegality of the act which it was sought to have them enter upon under this unconstitutional law, abandoned all further action in that direction. Hence, as certified by the Circuit court in the third finding, "*said board of commissioners failed* "*to make such subscription and procure such stock in that* "*behalf.*" As found by the United States Circuit court

and by the State court in *Wilson* v. *The Manufacturing Company*, the city council disavowed all connection with the manufacturing company. But viewing the proposed improvement as one generally beneficial to the entire community and promotive of the general interests and prosperity thereof, on the 15th day of June, 1869, adopted an ordinance for the submission to the people of the proposition to borrow $60,000, *to be expended in developing the natural advantages of the city for manufacturing purposes, etc.* (Rec., 33), and by the ordinance of July 30, 1869, to carry into effect the ordinance of June 15 (the former having been adopted by the majority of 823 voters), it was therefore enacted that $60,000 (not $100,000), of the bonds be issued and delivered to *Cushman*, to be used by him for the purposes aforesaid, etc.

Thereupon the contract with Cushman was entered into. (See pr. Record, pages 33, 34, 35, 36.)

Cushman occupied simply this position: The city council placed their bonds in *his* hands to be disposed of and converted into money by him, and took an agreement from *him* with a bond of indemnity for the proper application of the funds for the purposes contemplated, with the condition that the bonds "or the value thereof" (see pr. Rec., p. 36), or a *pro rata* share should be returned in case of failure, or partial failure, to construct the dams.

V.

The cases cited under the fifth proposition, by plaintiff's connsel, viz., *Scipio* v. *Wright*, 101 U. S., 665, has not the remotest bearing upon the questions here involved.

That case relates simply to the question of the power of the town to execute and to sell the bonds otherwise than for *their par value*, and as to their right, in view of the statute, to hand them over directly to the corporation in exchange for a like amount of stock, under section 1 of the act relating thereto.

See Laws of N. Y., 1852, p. 393.

That case simply involved the question, as to how far this court should be governed by the construction placed upon that particular statute by the Court of Appeals of New York. No such question arises in this case.

In *Town of Venice* v. *Murdock*, 92 U. S., 494, with reference to the general question as to the general right of a town having authority to borrow money for certain improvements, and issue its bonds, to deliver the same *directly to the improvement company instead* of paying the money, this court, as to the binding effect of the New York decisions upon such a question, said (p. 501): "It "is argued, however, that the New York decisions are "judicial constructions of a statute of that state; and, "therefore, that they furnish a rule by which we must "be guided. The argument would have force if the de- "cisions, in fact, presented a clear case of statutory con- "struction; but they do not. They are not attempts at "interpretation. They would apply as well to the execu- "tion of powers or authorities granted by private persons "as they do to the issue of bonds under the statute.

"They assert general principles, to wit: that persons "empowered to borrow money and give bonds therefor, "for the purpose of paying it to an improvement com- "pany, are not authorized to deliver the bonds directly to "the company, *a doctrine denied in this court*, in the

"Superior court of Pennsylvania, and even in the Court "of Appeals of New York."

But the discussion of this proposition is entirely irrelevant to the matter involved in this case.

It is not a question as to whether there has been a compliance with the provisions of any statute relative to the issue and delivery of bonds to an incorporated company for stock, as is apparent from the contract with Cushman and the ordinances and proceedings of the city council; "neither of the ordinances, it will be observed, "designated by name that or any other private company" (*Hackett* v. *Ottawa*, *supra*); nor does the contract with Cushman; but simply a general reference is made to the ordinance of the 30th of July, 1869 (printed record, 34), as follows: "That the said Cushman is authorized and "directed to expend the same in the improvement of the "water power upon the Illinois and Fox rivers within the "city and in the immediate vicinity thereof, under the "franchises and powers which have been granted for that "purpose by the legislature of the state, or which may "hereafter be granted for that purpose, *in the manner "which, in his judgment, shall best secure the practical "and permanent use of said water power in the city and "its immediate vicinity.*" And the concluding portion of the contract with Cushman (printed record, 36) is as follows: "The bonds being appropriated by the city to "*secure the completion of said work, and without other "consideration than the public benefit resulting to the city "thereby; and it is hereby agreed that nothing in this "contract, nor in the ordinances therein* referred to, shall "give to said city any right, title, interest or ownership, "whether in law or in equity, in the said improvements when "completed;" from which it is apparent that the allusions

to the frnachises granted or which might be granted had reference simply *to the fact then well understood, that these dams could not be constructed across the rivers without express legislative authority*, and that if sufficient *legislative authority had not been obtained to authorize their construction*, it was contemplated that *additional legislative authority should be obtained, so* that the desired improvements could be consummated.

Cushman, under this contract with the city, was not directed to perform the work through the agency of the Ottawa Manufacturing Company, of which he was a member. He had the undoubted right, under the authority, to appropriate the funds " in the manner, which in " his judgment shall " (should) best secure a practical and permanent use of said water power in the city and its immediate vicinity, as provided by the ordinance last named. To effect this object in any manner, and through the employment of any agency, which, in his judgment would best secure the end desired, that is to say, which possessed or should obtain the necessary legislative authority to erect dams across the river.

The city, as before remarked, with respect to the accomplishment of such purpose, under its undoubted charter power possessed all the incidental powers necessary to its accomplishment, to the same extent that any individual or private corporation could exercise it under similar circumstances.

Cushman took the bonds and impliedly agreed to negotiate them and obtain the money thereon appropriated to complete the desired improvements. This he did, through the agency of the manufacturing company, who took the bonds and sold them to Eames and other parties for their face value and portion of the accured interest, *and*

thus the loan was effected. (See 11th finding, printed record, page 37.)

Eames was a *bona-fide* purchaser for value and parted with his money believing the bonds to be valid, in which view the city authorities at the time undoubtedly concurred.

As said by Judge BLODGETT, in deciding this case: "It is evident, I think, that the common council preferred "to deal with Cushman as an individual, and accept the "guaranty of his personal contract for the faithful appli- "cation of the bonds for the use for which they were de- "signed, than to deal with a corporation; and the mere "fact that Cushman chose to execute his contract through "the agency of a corporation which had been created for "the purpose of making this contemplated improvement, "cannot affect the validity of the bonds in the hands of any "one who obtained them for value from or through "Cushman. Nor does it seem to me that even if Cush- "man had wholly violated his contract, would such viola- "tion furnish any defense to the city against a *bona fide* "purchaser of the bonds for value from Cushman. "What the understanding between Cushman and the Ot- "tawa Manufacturing Company was, the testimony does "not disclose, but it does appear satisfactorily that Cush- "man turned the bonds over to the manufacturing com- "pany, and that they expended the proceeds thereof for "the purpose for which they were designed by the com- "mon council, and the money which was used in the en- "terprise was obtained by means of these bonds from "Eames. * * * * *Is it right that a city which now "represents the same citizens who stood by and acquiesced "in the issue of these bonds, shall be allowed to repudiate "them in the hands of one of their own citizens, even, who*

"*has paid full value and whose money has been, so far as* "*we know, faithfully expended for the* purpose which the "bonds were designated? Further, here was, at least, a "full claim of power to issue them.

"*This municipality was by its charter empowered to is-* "*sue bonds to an unlimited extent for corporate purposes,* "*if sanctioned by a vote of the people.* The city authori- "ties treated water power improvement as a public pur- "pose; the citizens not only acquiesced in it, but publicly "voted for it by a large majority."

The other questions involved have been sufficiently discussed in the first brief filed in behalf of defendant in error. It is respectfully submitted that this desparate effort of the city of Ottawa to repudiate its obligations and consummate a most base and shameless fraud should not prevail, and that the judgment of the court below in this case should be affirmed.

G. S. ELDREDGE,
For Def't in Error.

STATE OF ILLINOIS, } ss. CHANCERY.
COUNTY OF LASALLE. }

Pleas, Proceedings, Judgments and Decrees before the Honorable JOSIAH MCROBERTS, one of the Judges of the Ninth Judicial Circuit of the State of Illinois, at a regular term of the LaSalle county Circuit court, begun and held at the County Court House in the city of Ottawa, in said county and State, on the second Monday (being the thirteenth day) of June, A. D. 1881, and of the Independence of the United States of America the one hundred and sixth.

Present: The Hon. JOSIAH MCROBERTS, *Presiding Judge.*
LAFAYETTE W. BREWER, *State's Attorney.*
CHASE FOWLER, *Master in Chancery.*
THOMAS CLARK, *Sheriff.*

Attest: WILLIAM W. TAYLOR, *Clerk.*

Be it remembered, that afterward, to wit, on the 22nd day of July, A. D. 1881, the same being one of the regular days of said June term of said court for said year, among the proceedings the following were had and entered of record, viz:

DECREE.

STATE OF ILLINOIS, } ss.
COUNTY OF LA SALLE. }

Circuit Court of said County, June Term thereof, 1881.

Robert Wilson and William F. Whitmore
v.
The Ottawa Manufacturing Company, Alexander M. Bruen, Lorenzo Leland, Dwight F. Cameron, Charles H. Force, John F. Nash, Charles Delano, William Hickling, William, S. Easton, Sherman Leland, Administrator of the Estate of William H. W. Cushman, deceased, and Charles Blanchard and Fanny R. Hoes, Administrators of the Estate of John V. A. Hoes, deceased; Lester H. Eames, Washington Bushnell, Henry Strawn, William T. Powell and Annie Dickey, Administratrix of the Estate of Jesse Dickey, deceased.

On this 26th day of March, 1880, this cause came up for hearing upon the bill of complaint of Robert Wilson

and William F. Whitmore, complainants herein, and upon the answers respectively of The Ottawa Manufacturing Company, Alexander M. Bruen, Lorenzo Leland, Dwight F. Cameron, Charles H. Force, John F. Nash, Charles Delano, William Hickling, and upon the said bill of complaint heretofore herein taken as and for confessed against the defendant, William S. Easton, and upon the answer of William H. W. Cushman, originally a defendant to said bill of complaint, filed in his lifetime, but who departed this life during the pending of this suit; and upon the answer of Sherman Leland, administrator of the estate of said William H. W. Cushman, said administrator having been duly made a party defendant to said bill of complaint, in the place and stead of said Cushman, deceased; and upon the answer of John V. H. Hoes, originally a defendant to said bill of complaint, filed in this suit during his lifetime, but who departed this life during the pendency of this suit; and upon the answer of Charles Blanchard and Fanny R. Hoes, administrators of the estate of said John V. A. Hoes, deceased, said administrators having been duly made parties defendant to this suit, in the place and stead of said John V. A. Hoes, deceased; and upon the answers of Lester H. Eames, Washington Bushnell, Henry C. Strawn, William T. Powell, and the answer of Jesse Dickey, filed herein during his lifetime, he having departed this life during the pendency of this suit; and upon the answer of Annie E. Dickey, administratrix of the estate of said Jesse Dickey, said administratrix having been duly made party defendant to said bill of complaint, in the place and stead of said Jesse Dickey, deceased; and upon the replications of complainants to said answers; and upon the evidence adduced

before the court on the hearing of this cause, and the said cause having been taken under advisement by the court, and the court being now fully advised in the premises; and it appearing to the court that all of the defendants have been duly served with the process of this court, and are duly and properly before this court, and the court having examined the pleadings and heard the evidence in this cause, and being now fully advised in the premises, doth find from the said pleadings and evidence in this case that said Robert Wilson, one of the complainants in this case, did, on the 22d day of February, A. D. 1875, at the January term of the Circuit court of said La Salle county, obtain a judgment in said Circuit court for the sum of eight hundred and eighty-eight dollars and forty-four cents, and costs of suit, against the said Ottawa Manufacturing Company, substantially as stated in said bill of complaint; and that said William F. Whitmore did, on the 22d day of February, A. D. 1875, at said January term of said Circuit court, A. D. 1875, obtain a judgment in said Circuit court for the sum of six hundred and twenty-two dollars and twenty-seven cents against said manufacturing company, and costs of suit, substantially as stated in said bill of complaint; and that afterwards, on the first day of June, A. D. 1875, an execution was duly issued from said Circuit court on each of said judgments against the goods, chattels and real estate of said Ottawa Manufacturing Company, and placed in the hands of the sheriff of La Salle county to execute; and that afterward, on the thirty-first day of August, A. D. 1875, the said sheriff returned each of said executions to the said Circuit court wholly unsatisfied, and that he finds no goods, chattels or real estate belonging to said Ottawa Manufacturing Com-

pany out of which to make the said executions, or either of them.

And the court further finds, from the pleadings and evidence herein, that said manufacturing company did not at the time of the rendition of said judgments, and has not since that time, and is not now the owner of any goods, chattels or real estate liable to execution, and that said Ottawa Manufacturing Company has never paid said judgments nor either or any part of the same.

And that said judgments remain wholly unpaid.

And the court further finds that there is now due the said Robert Wilson from said Ottatwa Manufacturing Company on said judgment so obtained by him against said company as aforesaid, the sum of eight hundred and eighty-eight dollars and forty-four cents, with interest on the same at the rate of six per cent. per annum, from the time of the rendition of said judgment to the present time, now amounting in all to the sum of twelve hundred and twenty-three dollars and eighty-three cents ($1,223.83) and costs of suit amounting to eighteen dollars and five cents.

And the court further finds that there is now due to the said William F. Whitmore from said Ottawa Manufacturing Company, on said judgments so obtained by him against said company as aforesaid, the sum of six hundred and twenty-two dollars and fifty-seven cents, with interest on the same at the rate of six per cent. per annum, from the time of the rendition of said judgment, now amounting in all to the sum of eight hundred and fifty-seven dollars and fifty-seven cents ($857.57) and costs of suit, amounting to fourteen dollars and eighty cents.

And the court further find, from the pleadings and

evidence in this case, that the said Ottawa Manufacturing Company, one of the defendants herein, was duly incorporated under an act of the legislature of said State of Illinois, entitled "An act to authorize certain persons to "construct a dam across Fox river for hydraulic and manu-"facturing purposes," approved February 15, A. D. 1851, and published in the private laws of said state for 1851, on page 159, and also under an amendment to said last named act, approved February 16, A. D. 1865, authorizing said Ottawa Manufacturing Company to construct dams across the Illinois and Fox rivers, near the city of Ottawa, in said county of LaSalle, for manufacturing purposes.

And the court further find, from the pleadings and the evidence in this case, that the said Ottawa Manufacturing Company was, during the year 1866, duly organized by the election of officers and a board of directors, and that after such organization said company fixed its capital stock at one hundred and twenty-five thousand dollars, and fixed the shares at one hundred dollars each, and that said company, acting through its board of directors, did, during the year 1866, cause books of subscription to its capital stock to be duly opened under and in accordance with said acts of incorporation for subscription to its capital stock, for the purpose of constructing dams across said Illinois and Fox rivers, and for manufacturing purposes as provided in said acts of incorporation.

And the court further finds, from the pleadings and evidence in this case, that during the year 1866 for the purposes aforesaid and named in said acts of incorporation, the following named defendants in this case, that is to

say, the said William H. W. Cushman subscribed one hundred shares of one hundred dollars each to the capital stock of said company; that the said Dwight F. Cameron subscribed ten shares of one hundred dollars each to the capital stock of said company; that the said John V. H. Hoes subscribed ten shares of one hundred dollars each to the capital stock of said company; that the said Lorenzo Leland subscribed ten shares of one hundred dollars each to the capital stock of said company; that the said William Hickling subscribed twenty shares of one hundred dollars each to the capital stock of said company; that the said Alexander M. Bruen subscribed fifty shares of one hundred dollars each to the capital stock of said company; that Charles Delano subscribed five shares of one hundred dollars each to the capital stock of said company, and that the said Charles A. Force subscribed five shares of one hundred dollars each to the capital stock of said company.

The court further finds that no other subscriptions have ever been made to the capital stock of said company than those above stated.

The court further finds, from the evidence, that at or about the time said subscriptions were made each of said subscribers to the capital stock of said company paid one per cent. of his individual subscription to said company for the purposes aforesaid, and that said one per cent. of said subscription is all that has ever been paid on said subscriptions, and that, with the exception of one per cent. so paid, each and all of said subscriptions now remains wholly unpaid—that is to say, that nine thousand nine hundred dollars of the amount so subscribed by said Cushman, remains wholly unpaid; that nine hundered and ninety dol-

lars of the amount so subscribed by said Cameron, remains wholly unpaid; that nine hundred and ninety dollars of the amount so subscribed by said Lorenzo Leland, now remains wholly unpaid; that nine hundred and ninety dollars of the amount so subscribed by said Hoes, now remains wholly unpaid; that nineteen hundred and eighty dollars of the amount so subscribed by William Hickeing, now remains wholly unpaid; that four thousand nine hundred and fifty dollars of the amount so subscribed by said Alexander M. Bruen, now remains wholly unpaid; that four hundred and ninety-five dollars of the amount so subscribed by said Charles Delano, now remains wholly unpaid; and that four hundred and ninety-five dollars of the amount so subscribed by said Charles H. Force, now remains wholly unpaid.

The court further finds that each of the persons so subscribing to the capital stock of said company then and there, by his subscription thereto became liable to pay to said company the amount of his subscription to its capital stock.

And the court further finds, and so decrees, that all and each of said unpaid subscriptions are equitably subject to and should be paid by said subscribers, so far as is necessary, and applied in the payment of the amount of said judgments and costs so obtained by said Wilson and Whitmore respectively, against said Ottawa Manufacturing Company.

The court further finds, from the evidence, that by an ordinance duly adopted by the city council of the city of Ottawa, on the 15th day of June, 1869, entitled, "An ordinance to provide for a loan for municipal purposes," the mayor of said city was authorized to borrow in the

name of said city at a rate of interest not exceeding ten per cent. per annum, the sum of sixty thousand dollars, to be expended in developing the natural advantages of the city for manufacturing purposes: which ordinance was ratified by a vote of the people of said city, on the 20th of July, 1869, and that in pursuance of an ordinance of said city, adopted on the 30th day of July, 1869, entitled, "An ordinance to carry into effect the ordinance of June 15th, 1869, entitled, 'An ordinance to provide for a loan for municipal purposes,'" the said city of Ottawa caused to be issued bonds of said city to the amount of sixty thousand dollars for the purposes aforesaid: And among other things said ordinance provided that said bonds should be placed in the hands of William H. W. Cushman, to be by him expended for the purposes aforesaid in the improvement of the water-power, afforded by the Illinois and Fox rivers, within the city or in the immediate vicinity thereof; *Provided* that said William H. W. Cushman, should execute and deliver to the mayor of said city of Ottawa, an agreement that he would without unreasonable or unnecessary delay cause a good, substantial and sufficient dam to be constructed across the Illinois river, above the said city of Ottawa, to bring into use all the available water-power of said river, at said city of Ottawa, and that he would construct sufficient head and tail races to make such water-power available, as soon as the same should be required for actual use, and as fast as it can be leased, at fair and reasonable rates; *and provided, further*, that said Cushman should bind himself that in case such works were not constructed as aforesaid, that he, the said Cushman, would return said bonds to said city of Ottawa, or the

value of the same, and to saye the said city harmless from loss on account of the same, and that said Cushman did enter into a contract with said city, on the 2nd day of August, 1869, in which he obligated himself to comply with the conditions of the last above mentioned ordinance, and among other things assume the performance of the conditions aforesaid; whereupon the said city, in consideration of the above mentioned obligations, delivered said bonds to said Cushman.

The court further finds that the said Cushman afterwards, on or about the 2nd day of February, 1871, with the knowledge and assent of said city, delivered the said bonds to the said defendant, the Ottawa Manufacturing Company, and that said bonds were received by said company, which company therefrom, with the knowledge and consent of said city, assumed the performance of the conditions of said contract to be performed with said Cushman for the purposes aforesaid; and to that end they, the said company executed their bond to said city, for the fulfillment of the conditions of said contract so to be performed by said Cushman, and that when said bonds of said company were executed, said Cushman delivered them, the said bonds of said city, to the treasurer of said company, and they were by said company sold and converted into money.

The court further finds, from the evidence in this case, that soon after said Cushman placed said bonds in the treasury of said company, the directors of said company caused stock of said company to be issued on and representing said bonds to the amount of sixty-one thousand dollars to the following named persons respectively, that is to say: to said Cushman sixteen thousand dollars,

to said John V. A. Hoes, fourteen thousand dollars; to the said Dwight F. Cameron, nine thousand dollars; to the said Lorenzo Leland, nine thousand dollars; to said Charles H. Force, five thousand dollars; to said William S. Easton, four thousand dollars; and to said John F. Nash, four thousand dollars.

The court further finds from the evidence that said stock was issued to the last above named persons for the purpose of dividing said bonds for sixty thousand dollars or their proceeds among said last-named persons, that is to say, said Cushman, Hoes, Cameron, Leland, Force, Easton and Nash.

And the court further finds that neither said Cushman, nor said company, nor said Hoes, Cameron, Leland, Force, Easton or Nash, ever paid anything whatever to said city for said bonds, and that said company held said bonds for sixty thousand dollars and the proceeds derived therefrom for the sole purpose of applying the same, together with the proceeds of the subscriptions, to the capital stock of said company in constructing said dams across said rivers and defraying the expenses thereof, and that the issuing of said stock on and representing said bonds to said Cushman, Hoes, Cameron, Leland, Force, Easton and Nash, was in fraud of the rights of the creditors of said company.

The court finds that said company did construct dams across said Illinois and Fox rivers, and that said company, in constructing said dams, used only the proceeds arising from the sale of said bonds so issued and delivered by said city of Ottawa to said Cushman, and by him to said company, and did not use any of the subscriptions to the capital stock of said company, except the one per cent. of said subscriptions so paid as hereinbefore stated.

The court further finds that said judgments in favor of said Wilson and Whitmore against said company were obtained for services, work and labor rendered and done by said Wilson and Whitmore for said company in constructing its said dams.

The court further finds, from the pleadings and evidence, that after the construction of said dams in the year 1872, the said Hoes, Leland, Cameron, Nash and Easton sold the stock so issued to them as aforesaid, on and representing said bonds, for sixty thousand dollars for twenty-five per cent. of the face value of said stock, and received the money therefor, that is to say, the said Hoes sold the stock so issued to him on said bonds for the sum of thirty-five hundred dollars, and received the money or its equivalent therefor; that said Leland sold the stock so issued to him or said bonds for the sum of twenty-two hundred and fifty dollars, and received the money or its equivalent for the same; that said Cameron sold the stock so issued to him on said bonds for the sum of twenty-two hundred and fifty dollars, and received the money or its equivalent for the same; that said Nash sold the stock so issued to him on said bonds for one thousand dollars, and received the money or its equivalent therefor, and that said Easton sold the stock so issued to him on said bonds for one thousand dollars, and received the money or its equivalent therefor.

The court further finds that in equity the money received by said Hoes, Leland, Cameron, Nash and Easton from the sale of said stock so issued to them on said bonds as aforesaid, did not and does not belong to them as against the creditors of said company; and the court further finds and so decrees that said Hoes, Leland,

Cameron, Nash and Easton are in equity liable, and ought to apply the money so received by them from the sale of the stock so issued on said bonds, so far as is necessary in payment of said judgments so obtained by said Wilson and said Whitmore against said company.

And the court further finds, from the evidence, that the estate of said Cushman is now wholly insolvent, and that said Easton and said Force are each now wholly insolvent.

And the court further finds that the evidence in this case does not show that the said defendants Lester H. Eames, Washington Bushnell, Henry Strawn, William F. Powell and Annie Dickey, administratrix of the estate of Jesse Dickey, deceased, are indebted to the said Ottawa Manufacturing Company. It is therefore ordered that the bill of complaint herein be dismissed as to said Eames, Bushnell, Strawn, Powell and Annie Dickey, administratrix as aforesaid.

And the court further finds that in addition to the said sum of nine hundred and ninety dollars hereinbefore found to be due from said estate of John V. A. Hoes, deceased, to said company for unpaid subscription to its capital stock, the said estate of John V. A. Hoes is indebted to said Ottawa manufacturing company in the further sum of thirty-five hundred dollars, the same being the sum of money received by said Hoes in his lifetime from the proceeds of the said sale of said stock so issued to said Hoes on said bonds, as hereinbefore stated and found.

And the court further finds and so decrees that the said indebtedness of the estate of said Hoes, deceased, to said company, amounting in all to four thousand four hundred and ninety dollars, is equitable, subject to, and ought to

be paid and applied, so far as is necessary, in the payment of the amount of said judgments and costs so obtained as aforesaid by said complainants, Wilson and Whitmore, respectively, against said Ottawa Manufacturing Company.

And the court further finds that in addition to the sum of nine hundred and ninety dollars, hereinbefore found to be due from said Lorenzo Leland to said company for unpaid subscription to its capital stock, the said Lorenzo Leland is further indebted to said Ottawa Manufacturing Company in the sum of twenty-two hundred and fifty dollars the same being the sum of money received by said Leland from the proceeds of said sale of said stock so issued to said Leland on said bonds, as hereinbefore stated and found.

And the court further finds and so decrees that the said indebtendess of said Lorenzo Leland to said company, amounting in all to three thousand two hundred and forty dollars, is equitably subject to, and ought to be paid and applied, so far as is necessary, in the payment of the amounts of said judgments and costs so obtained by said complainants, Wilson and Whitmore, respectively, against said Ottawa Manufacturing Company.

And the court further finds that, in addition to the said sum of nine hundred and ninety dollars hereinbefore found to be due from said Dwight F. Cameron to said company for unpaid subscription to its capital stock, the said Dwight F. Cameron is further indebted to said company in the sum of twenty-two hundred and fifty dollars, the same being the sum of money received by said Cameron from the proceeds of said sale of said stock so issued to said Cameron on said bonds as hereinbefore stated and found.

And the court further finds and so decrees, that the said indebtedness of said Dwight F. Cameron to said company, amounting in all to three thousand two hundred and forty dollars, is equitably subject to and ought to be paid and applied, so far is necessary, in the payment of the amounts of said judgments so obtained as aforesaid by said complainants, Wilson and Whitmore, respectively, against said Ottawa Manufacturing Company.

And the court further finds that said John F. Nash is indebted to said company in the sum of one thousand dollars, the same being the sum of money receive by said Nash from the proceeds of said sale of said stock so issued to said Nash on said bonds as hereinbefore found.

And the court further finds and so decrees, that the said indebtness of said Nash to said company, amounting to one thousand dollars, is equitably subject to and ought to be paid and applied, so far as is necessary, in the payment of the amounts of said judgments so obtained as aforesaid by said complainants, Wilson and Whitmore, respectively, against said company.

And the court further finds, from the evidence and pleadings, that the said William S. Easton is indebted to the said Ottawa Manufacturing Company in the sum of one thousand dollars, the same being the sum of money received by said Easton from the proceeds of said sale of stock so issued to said Easton on said bonds as hereinbefore found.

And the court finds and so decrees, that the said indebtedness of said Easton to said company, amounting to one thousand dollars, is equitably subject to and ought to be paid and applied, so far as is necessary, in the pay-

ment of the amounts of said judgments so obtained as aforesaid by said complainants, Wilson and Whitmore, against said company.

And the court further finds, from the evidence and pleadings, that the estate of the said William H. W. Cushman, deceased is now indebted to the said company in the sum of nine thousand and nine hundred dollars, for unpaid subscriptions to the capital stock of said company, made by said Cushman in his lifetime, and which now remain unpaid and due to said company, as hereinbefere stated and found.

And the court further finds, and so decrees, that the said indebtedness of the said estate of Cushman, deceased, to said company, amounting to nine thousand and nine hundred dollars, is equitably subject to and ought to be paid and applied, so far as it is necessary, in the payment of the amounts of said judgments, so obtained as aforesaid, by said complainants Wilson and Whitmore, against said manufacturing company.

And the court further finds, from the pleadings and evidence, that the said Alexander M. Bruen is now indebted to said company in the sum of four thousand nine hundred and fifty dollars, for subscriptions to the capital stock of said company, made by said Bruen, and which now remain unpaid and due to said company, as hereinbefore stated and found.

And the court further finds, and so decrees, that the said indebtedness of the said Alexander M. Bruen to said company, amounting to four thousand nine hundred and fifty dollars, is equitably subject to and ought to be paid and applied, so far as is necessary, in the payment of the amounts of said judgments so obtained as aforesaid, by

said complainants Wilson and Whitmore, against said manufacturing company.

And the court further finds, from the evidence and pleadings in this case, that the said William Hickling is now indebted to the said Ottawa Manufacturing Company in the sum of nineteen hundred and eighty dollars, for subscriptions to the capital stock of said company, made by said Hickling, and which now remains unpaid and due to said company, as hereinbefore stated and found.

And the court further finds, and so decrees, that said indebtedness of said William Hickling, amounting to nineteen hundred and eighty dollars, is equitably subject to and ought to be paid and applied, so far as is necessary, in the payment of the amounts of said judgments, so obtained as aforesaid, by said complainants Wilson and Whitmore against said manufacturing company.

And the court further finds from the pleadings and the evidence, that the said Charles Delano, one of said defendants, is now indebted to said Ottawa Manufacturing Company in the sum of four hundred and ninety-five dollars, for subscriptions to the capital stock of said company, made by said Delano, and which now remains unpaid and due to said company, as hereinbefore stated and found.

And the court finds and so decrees, that the said indebtedness of the said Charles Delano, amounting to four hundred and ninety-five dollars, is equitably subject to and ought to be paid and applied, so far as is necessary, in the payment of the amounts of said judgments so obtained as aforesaid by said Wilson and Whitmore, complainants, against said manufacturing company.

And the court further finds, from the evidence and

pleadings in this case, that the said Charles H. Force, one of said defendants, is now indebted to the said Ottawa Manufacturing Company in the sum of four hundred and ninety-five dollars, for subscriptions to the capital stock of said company, made by said Force, and which now remains unpaid and due to said company, as hereinbefore stated and found.

And the court further finds and so decrees, that said indebtedness of said Charles H. Force to said company, amounting to four hundred and ninety-five dollars, is equitably subject to and ought to be paid and applied, so far as is necessary, in the payment of the amounts of said judgments so obtained as aforesaid by said complainants, Wilson and Whitmore, against said Ottawa Manufacturing Company.

And it further appearing to the court, from the pleadings and the evidence in this case, that the defendants, Lorenzo Leland, Dwight F. Cameron, John F. Nash, William S. Easton, William Hickling, Alexander M. Bruen, Charles Delano and Charles H. Force, and Sherman Leland, administrator of the estate of the said William H. W. Cushman, and Charles Blanchard and Fannie R. Hoes, administrators of the estate of the said John V. A. Hoes, deceased, ought in equaity to pay the amounts of said judgments so obtainted by said complainants, Wilson and Whitmore, as aforesaid, or cause the same to be paid.

It is therefore ordered, adjudged and decreed by the court that the said defendants, Lorenzo Leland, Dwight F. Cameron, John F. Nash, William S. Easton, William Hickling, Alexander M. Bruen, Charles Delano and Charles H. Force, and Charles Blanchard, and Fannie

R. Hoes, adminstrators of the estate of the said John V. A. Hoes, deceased, and Sherman Leland, administrator of the estate of the said William H. W. Cushman, deceased, be and they are hereby required to pay to Robert Wilson, one of said complainants, the amount of his said judgment and costs of suit against said Ottawa Manufacturing Company, now amounting to twelve hundred and forty-one dollars and eighty-eight cents, and to William F. Whitmore, the other of said complainants, the amout of his said judgment and cost of suit against the said Ottawa Manufacturing Company, now amounting to eight hundred and seventy-two dollars and thirty-seven cents, within thirty days from and after the date of this decree. The said adminstrator of the estate of said Cushman, and the said administrators of the estate of said Hoes, deceased, to pay in due course of administration.

It is further ordered by this court, that in case said last named defendants shall fail to pay said sum of twelve hundred and forty-one dollars and eighty-eight cents to said Wilson, and said sum of eight hundred and seventy-two dollars and thirty-seven cents to said Whitmore within said thirty days from and after the date of this decree as herein above ordered and decreed, that then the clerk of this court shall, on the application of said complainants, issue separate executions having the same operation and effect as similar writs issued upon judgments at law in favor of said Wilson and against the goods and chattels and real estate, land and tenements of each of said defendants, Lorenzo Leland, Dwight F. Cameron, John F. Nash, William S. Easton, William Hickling, Alexander M. Bruen, Charles Delano, and Charles H. Force, directed to the sheriff of the proper county where the goods, chat-

tels or real estate lands and tenements of said last named defendants may be situated, commanding such sheriff to make the sum of twelve hundred and forty-one dollars and eighty-eight cents herein above found to be due from said Ottawa Manufacturing Company to said Wilson, and interest thereon at the rate of six per cent. per annum from the date of this decree, and that the said clerk shall also issue similar separate executions having the like force and effect in favor of said Whitmore against the goods, chattels and real estate, land and tenements of each of said last named defendants, Leland, Cameron, Nash, Easton, Hickling, Bruen, Delano and Force, directed to the sheriff of the proper county as aforesaid, and commanding such sheriff to make the sum of eight hundred and seventy-two dollars and thirty-seven cents herein above found to be due from said manufacturing company to said Whitmore, said executions to be as near as may be in the same form as similar writs issued on judgments at law, and shall be made returnable ninety days after date thereof, and said sheriff shall make return of such executions to this court with the manner of the execution thereof.

It is further ordered by the court that in no case shall there be collected from any one of said defendants on all of the executions issued against him a greater amount (in the aggregate) than (the amount) by this decree found to be due from such defendant to the Ottawa Manufacturing Company, with interest thereon at the rate of six per cent. per annum from the date of this decree, and the clerk in issuing such execution shall endorse on the same the amount so found to be due from the defendant in such execution to said company, and state that no greater amount shall be collected from him on said execution; *Provided*, that no more shall be collected in the aggre-

gate on any or all executions so issued than sufficient to discharge the amount so found due to said complainants, with interest from the date of this decree, and the costs of this suit to be taxed.

And it is further ordered by the court that the said Lorenzo Leland, Dwight F. Cameron, John F. Nash, William S. Easton, William Hickling, Alexander M. Bruen, Charles Delano and Charles H. Force, and Sherman Leland, administrator of the estate of said William H. W. Cushman, and Charles Blanchard and Fannie R. Hoes, administrators of the estate of John V. A. Hoes, pay the costs of this proceeding to be taxed (that said administrators pay such costs in due course of administration), and that complainants have execution for the same against said Leland, Cameron, Bruen, Easton, Delano, Nash, Hickling and Force.

J. McROBERTS,
Judge.

STATE OF ILLINOIS, }
COUNTY OF LASALLE. } ss.

I, William W. Taylor, clerk of the Circuit court, in and for said county, in the State aforesaid, and keeper of the records and files thereof, do hereby certify the above and foregoing to be a true, full and complete copy of a decree rendered and entered of record of said court in the case wherein Robert Wilson *et al.* were complainants, and the Ottawa Manufacturing Company *et al.*, defendants.

In witness of which, I hereunto set my hand, and the seal of said court, this 12th day of August, A. D. 1882.

[SEAL.] W. W. TAYLOR,
Clerk.

STATE OF ILLINOIS,
SUPREME COURT,
NORTHERN GRAND DIVISION.

AT A SUPREME COURT begun and held at Ottawa, on Tuesday, the seventh day of March, in the year of our Lord one thousand eight hundred and eighty two, within and for the Northern Grand Division of the State of Illinois.

Present: Hon. ALFRED M. CRAIG, *Chief Justice.*
PINKNEY H. WALKER, *Justice.* BENJ. R. SHELDON, *Justice.*
T. LYLE DICKEY, *Justice.* JNO. SCHOLFIELD, *Justice.*
JOHN M. SCOTT, *Justice.* JOHN H. MULKEY, *Justice.*
EVERELL F. DUTTON, *Clerk.*

Be it remembered, that afterwards, to wit, on the 21st day of June, A. D. 1882, the opinion of the court was filed in the clerk's office of said court, in words and figures following to wit:

SARAH A. HICKLING, Executrix, &c., et al.
No. 41. *vs.* } Error Second District.
ROBERT WILSON et al.

OPINION.

MULKEY, J.: It appears from the record in this case that at the January term, 1875, of the La Salle Circuit court, Robert Wilson and William F. Whetmore severally recovered judgments against the Ottawa Manufacturing Company, the former for $880.40, the latter for $622.57; that executions having been sued out on said judgments and returned *nulla bona*, the plaintiffs therein on the 29th day of September, 1875, filed in said court a creditor's bill against the company and certain other parties, including the appellants, alleged to be stockholders of and indebted to the

company on account of unpaid subscriptions to its capital stock and of moneys and effects in their hands belonging to the company, which the complainants seek by their bill to subject to the payment of their judgments.

That the company was incorporated under a special act of the legislature approved February 15, 1851, and an act amendatory thereof approved February 16, 1865, authorizing the company to construct dams across the Illinois and Fox rivers in or near the city of Ottawa, in the county of La Salle, for manufacturing purposes; that the company during the year 1866 was duly organized by the election of officers and a board of directors, who caused books of subscription to its capital stock to be opened, as provided by its charter; that William H. W. Cushman subscribed one hundred shares of $100 each to the capital stock of the company, John V. A. Hoes ten shares, Lorenzo Leland ten shares, William Hickling twenty shares, Alexander M. Bruen fifty shares, Charles Delano five shares, Charles H. Force five shares; that these were all the subscriptions ever made; that no part of them has ever been paid, except one per cent. thereof, which was paid by the subscribers respectively about the time they were made; that these several subscriptions, less the one per cent. paid, are still due the company from the subscribers respectively, or their legal representatives, except the subscription of Bruen, which, by reason of certain conditions annexed to it, never became binding upon him; that the city council of the city of Ottawa, having the requisite power for that purpose, on or about the 15th of June, 1869, issued in the name of the city $60,000 in bonds, which were delivered to the said William H. W. Cushman, to be by him expended in the improvement of

the water power afforded by the Illinois and Fox rivers by building dams across the same, the city taking from him at the time an indemnity contract, by which he bound himself to either construct the dams in a reasonable time or refund the bonds or their proceeds, or otherwise save and keep the city harmless with respect to their issue; that Cushman, on or about the 2nd of February, 1871, with the assent of the city, delivered the bonds in question to the Ottawa Manufacturing Company, and the company thereupon entered into a bond by which it assumed the performance of Cushman's contract with the city; that upon this delivery of these bonds to the company, or shortly thereafter, the directors of the company issued stock, representing the same to the following named persons, namely: To Cushman, $16,000; Hoes, $14,00; Cameron, $9,000; Leland, $9,000; Force, 5,000; Easton, $4,000; and Nash $4,000; that the issue of the stock last above mentioned was in fraud of the creditors of the company; that the company built the dams in question, using only the proceeds of the city bonds for that purpose; that the judgments of appellees were obtained on account of work and labor done by them for the company in constructing said dams; that after the construction of said dams in 1872, Hoes, Leland, Cameron, Nash, and Easton sold their part of the stock, so fraudulently issued, as above stated, at twenty-five per cent. of its face value, and received payment therefor in money or its equivalent; that Cushman, Easton and Force are insolvent; that there is due the company an account of the proceeds of their respective shares of the stock received by Hoes, Leland, and Cameron, last above mentioned, the following additional sums of money, namely: From Hoes, $3,500;

from Leland, $2,250; and from Cameron $2,250; that there is also due said company on same account from Nash and Easton respectively the sum of $1,000.

The circuit court upon this state of facts decreed that the complainants were entitled to have their respective judgments paid out of the said several sums of money so found to be due from the defendants to the company on either of the accounts above mentioned, and ordered the parties, respectively, to pay the same within thirty days, and that in default of such payment the clerk of the court was required to issue separate executions against each of the defendants liable in his own right for the amount due from him to the company, and such of the defendants as were found liable in their representative capacity were directed to pay the several amounts due from them respectively in due course of administration.

The decree in this case, so far as it relates to the parties now before the court, was affirmed by the Appellate court for the second district, and a reversal of the judgment of that court is earnestly urged on several grounds.

First, it is insisted there is no community of interest between the complainants with respect to the claims sought to be enforced by the bill; that they are totally distinct, having no connection whatever with each other, hence it is claimed the bill is multifarious, and that the circuit court should have sustained the objection taken to it on that ground, and that its failure to do was error. This objection is not tenable. We understand the doctrine to be well settled that two or more judgment creditors may join in a bill of this character. In such cases there is an identity of interest in the question involved and in the belief sought, and the separate injury sustained by each com-

plainant is produced by the same cause or wrongful acts. Moreover, the direct effect of joining several creditors in one bill is to prevent a multiplicity of suits, which, of itself, is a distinct source of equity jurisdiction. These several elements appearing in the case, we are of opinion are sufficient to sustain the jurisdiction. 1 Pomeroy's Equity Jurisprudence, Sec. 269.

The objection which seems to be entitled to the most consideration, and which is urged with the greatest pertinacity, is that the evidence does not, in several respects, warrant a decree. First, it is claimed there was never any valid organization of the company until after Cushman's contract with the city to build the dams; that the subscriptions prior to that time were, to use counsel's own terms—mere experimental subscriptions—which were intended at the time to be abandoned if the satisfactory amount should not be subscribed, and were, in fact, subsequently so abandoned, and, it must be confessed, the testimony of Leland and others would, if there was no other evidence bearing on the subject, give color to this view; yet, we did not think, when their testimony is considered in connection with other uncontroverted facts in the case, it sustains it, but, on the contrary, when thus considered, it rather strengthens the opposite conclusion. The decided weight of testimony shows that after the temporary organization of the company in April, 1866, a subscription book was provided and subscriptions made in it by Leland and others specified in the decree. By way of impeaching these subscriptions, Leland testifies as follows: So far as I know, all the subscriptions obtained in the spring of 1866 were abandoned, and the parties never afterwards recognized or called upon as stockholders. It

was generally understood that unless a certain amount was subscribed we would not go on, and the amount was never made up. Afterwards Cushman made a contract with the city to built the dam, and he proposed to reorganize the company. I don't think there was any thing said about the old company, and thereupon we organized a new company under the old charter and ignored all except those Cushman designated.

There was a great many that was not asked to come into the new company, and never did come into it.

It will be observed, in the first place, that the fact that the subscriptions were made is not denied by Leland, but, on the contrary, it is distinctly admitted; and while he claims there was an understanding, and this we do not question—that if a satifactory amount was not obtained the subscriptions were to be abandoned—there is no pretense or claim that any such condition was annexed to the subscriptions themselves, and it is clear the legal effect of those subscripttons as to third parties could not be qualified or limited by any general understanding between the subscribers.

The form of the subscriptions set out in the record shows they were absolute and unconditional.

It also appears from the records of the company the subscribers, so far from abandoning their subscriptions, as is claimed, on the 20th of August, 1867, held a formal meeting, at which a permanent organization was effected by the election of a board of directors and by readopting existing by-laws.

The introducing part of the minutes of the meeting is as follows: "Pursuant to a call published in the Ottawa

"papers, the *subscribers of the capital stock* of the Ottawa "Manufacturing Company met at the office of the com- "pany in Ottawa. Present, W. H. W. Cushman, L. Le- "land, J. Va. Hoes, D. F. Cameron, W. S. Eaton, and "Charles H. Force." On motion, all of the above named persons, together with J. F. Nash, were elected a board of directors of the company. On the same day, at a called meeting of the board of directors so elected, a resolution was adopted by the board directing the secretary to notify the commissioners of the city the company was organized and prepared to receive the city's subscriptions, &c. Subsequently, and before the supposed reorganization in 1871, the company, by resolutions, adopted a seal with the words, "organized in 1867" upon its face. In addition to this there is nothing to be found in the proceedings of the company from the time of its permanent organization in 1867 down to the time of the trial showing a reorganization of the company, or even an attempted abandonment of the subscriptions to the capital stock of the company, but, on the contrary, the record of these proceedings, clearly and beyond all reasonable doubt, established the contrary.

It is highly probable that some of the subscribers, after the handsome donation of $60,000 on the part of the city towards the enterprise, concluded they would never be called upon for their subscriptions, and this was probably talked around among them to such an extent as to give color to the hypothesis the subscriptions had been abandoned, but nothing more. That this view was not general among the subscribers, is clearly shown by the fact that several of them have declined to testify on the subject. But even if all had shared in a general understanding of the

kind, it would not at all affect or change their liability on their subscriptions. Moreover, if these were not valid and binding subscriptions, the present case furnishes the very remarkable instance of a private joint stock corporation affecting a permanent organization of the company and successfully carrying on its corporate business for a number of years without a single dollar of its capital stock having ever been subscribed; for since the evidence clearly shows these were the only subscriptions ever made, it follows if they were invalid in contemplation of law, no stock was ever subscribed.

As none but subscribers to the stock were authorized to permanently organize the company, it follows if the position of appellants is correct there never has been any valid organization of the company. In the light of the facts before us, we cannot for a moment sanction this view of the matter. The very parties who claim these subscriptions were abandoned were active participants in the management of the company's affairs for a number of years, attending its business meetings and voting upon all questions affecting its interests. If they were not *bona fide* subscribers to the company's stock, by what right did they vote and participate in the management of the company's affairs?

It is also insisted that the $60,000 in bonds given by the city to Cushman belong to Cushman, subject only to his personal contract with the city, to either make the improvements in question, or, in case of failure, to indemnify the city, and that he therefore had a right to make any disposition of the bonds he pleased; and having used them in the purchase of an equal amount of the company's stock, and having divided it in the manner he did, no one

has a right to complain or call on those receiving it to account for the proceeds.

This view of the transaction is so palpably unreasonable and inconsistent with the admitted facts as not to merit serious consideration. It certainly never was intended by the city to donate these bonds to Cushman. They were clearly given to him to be expended as they subsequently were by the company in building the dams across the two rivers. His liability under his contract with the city on account of the bonds was merely contingent, and absolutely ceased when the bonds were thus used and the dams completed. Cushman turned over the bonds to the company to be used in the manner they were in consideration that the company would indemnify him against all liability on account of his contract with the city, which the company did. If the $60,000 in bonds was simply given in exchange for a like amount of stock, the bonds then ought to and would have belonged absolutely to the company, to be used in any manner they might think proper, for upon that hypothesis they were paid for by the stock.

Yet the company was required, as we have just seen, to expend them in the building of the dams, and also to release Cushman from all liability on account of them. The actual transaction between the parties, when relieved of the little mist which the argument of counsel throws around it, is simply this: The city of Ottawa made a donation of $60,000 in bonds, to be applied in building dams across the Illinois and Fox rivers, and these dams were built by the company and the funds faithfully applied to that purpose, and Cushman and his confederates have received the value of the bonds in the company's stock, for

which they have never paid a single cent, some of which they have sold and converted into money, which they are now called upon to apply in the discharge of appellee's claims against the company for labor and services performed by them in the building of said dams. This is all there is of it, and justice and equity alike say the money thus received should be so applied.

The remaining objection to the decree, which we deem necessary to notice, is that it is erroneous in awarding executions for its enforcement. It is said the court, having all the parties before it, should have made an equitable disposition of the case and not have left it so that the whole claim might be collected from one and nothing from the others.

We do not understand the law required the court to marshal the assets of the company in the hands of the defendants and apportion the amount of appellees' claims among them. This is not the ordinary case of several persons being called on to pay a common indebtedness for which all are jointly and severally liable where a court of equity will apportion the burden equally between them, but it is the case of several debtors owing distinct and independent claims to a common creditor where each, in equity and good conscience, is bound for the full amount of his own claim and where neither is required to pay any thing more than what he owes himself. The complainants, having exhausted their remedy at law against the company, are in equity subrogated to its rights against its debtors, and the present proceedings are in the nature of any equitable attachment by which such claims of the company may be made available in the payment of its own debts. If the company was now suing one of these defendants for the amount of the claim against him, it

would clearly be no defense to show it had failed to collect a similar claim against one of the others. And if all were proceded against and judgments recovered, executions might be sued out against all at the same time or only against one, or any number less than all, as the company might think proper, and the adoption of either course suggested would afford no ground for complaint. And as appellees are subrogated to the company's rights in this respect, and they are, by means of the decree in question, doing nothing which the company might not rightfully do in its own name, we perceive no just ground for complaint. No defendant under the decree will, in any event, be required to pay more than he he justly owes, and this is not only legal, but just and eqitable.

Moreover, the decree in this respect is fully sustained by the authorities. *Hatch* v. *Dana*, U. S. R. 101.

Judgment affirmed.

STATE OF ILLIONIS,
SUPREME COURT,
NORTHERN GRAND DIVISION. } ss.

I, Everell F. Dutton, clerk of Supreme court, in and for the Northern Grand Division of the State of Illinois, do hereby certify that the foregoing is a true copy of the final opinion of the said Supreme court in the above entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Supreme court, at Ottawa, this 11th day of August in the year of our Lord one thousand eight hundred and eighty-two.

E. F. DUTTON,
Clerk of Supreme Court.

[SEAL.]

FILED
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JAMES H. McKENNEY, Clerk

In the Supreme Court of the United States,

OCTOBER TERM, A. D. 1882.

CITY OF OTTAWA,
Plaintiff in Error,
vs.
WILLIAM H. CAREY,
Defendant in Error.

Error to Circuit Court, Northern District of Illinois.

STATEMENT OF CASE AND FINDINGS OF FACT,

Filed by Plaintiff in Error, on Re-hearing.

LAWRENCE, CAMPBELL & LAWRENCE,
AND
M. T. MOLONEY,
For Plaintiff in Error.

C. B. LAWRENCE,
Of Counsel.

CHICAGO:
PRESS OF BLAKELY, HARKNESS & CO., 108 RANDOLPH STREET.
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As our former argument may have been mislaid, we reprint the statement of facts contained therein, and the special findings of the court.

STATEMENT.

At the October term, 1878, of this court, an opinion was filed in the case of *Hackett* v. *The City of Ottawa*, in which it was held that certain bonds issued by the City of Ottawa were valid, when in the hands of innocent purchasers for a valuable consideration.

The present suit is upon a part of the same series of bonds, but differs from the former in this most important particular, namely, that while Hackett, the former plaintiff, was admitted to have bought the bonds without notice of any defect in them, or illegality in their issue, the plain-

tiff in this case was a purchaser with full notice of all the facts upon which we rely as showing their invalidity. This case was submitted to the court without a jury, and this notice is one of the findings of fact.

In the former case the court also discussed, to some extent, the question whether the bonds were given for a corporate or municipal purpose, but came to no conclusion on that point.

The court said:

"But a direct decision of that question does not seem "to be essential to the disposition of this case. We "content ourselves with stating the propositions which "counsel have urged upon our consideration, and without "expressing any settled opinion as to what are corporate "purposes within the meaning of the Illinois constitution, "we pass to another point, which, in our judgment, is "fatal to the defense." The court then proceeds to show that the purchaser was entitled to protection as a purchaser without notice.

It is apparent to the court, from the foregoing remarks, that this suit is brought upon certain bonds issued by the City of Ottawa, State of Illinois. Various special pleas were filed, but it was finally agreed that a jury should be waived, the case should be tried by the court, and all defenses admitted under the general issue that would be admissible under any special pleas that could be filed. These agreements are in the record. The case was tried in pursuance of these stipulations, and the court found the facts specially, and gave judgment for the plaintiff for the amount of the bonds and interest. To this judgment the city prosecutes a writ of error. We have prefixed to our argument the findings of the court, but we will state the facts here in a more concise form.

On the 15th of February, 1851, the legislature of Illinois passed an act creating W. H. W. Cushman and certain other persons named in the act a corporation under the name of the "Ottawa Manufacturing Company," and gave it authority to erect a dam across Fox river, at a specified point near the City of Ottawa, "for the purpose "of creating a water power," and to "use, lease or "otherwise dispose of the same, and to construct such "other works, building and machinery as may be deemed "necessary or proper to use such water power to pro- "mote the interests and objects of the company."

The company was incorporated chiefly to create a water power at Ottawa, but also with leave to use it as the interests of the company might dictate.

On the 16th of February, 1865, another act was passed amending the former act, and giving the company power to erect a dam across the Illinois river as well as the Fox, and to construct certain water races.

We now call the attention of the court to another act of the legislature set out at length in the findings, entitled "An act to authorize the City of Ottawa to subscribe "to the stock of the Ottawa Manufacturing Company," approved February 19, 1867. This was the company created by the first of the acts above mentioned.

The act of 1867, now referred to, was in fact an act amending the charter of the City of Ottawa. It was entitled "An act to authorize the City of Ottawa to sub- "scribe to the stock of the Ottawa Manufacturing Com- "pany." It created certain persons named in the act a board of commissioners, and this board was authorized, "for and on behalf of said city, to subscribe to the capital "stock of the Ottawa Manufacturing Company the sum

"of one hundred thousand dollars, and when fully paid, to "receive and hold the stock of said company for the "same, and the proceeds thereof, for and on behalf of said "city."

The act further authorized said commissioners, in order to raise the money for such subscription, to make, execute and dispose of bonds of the city to the amount of one hundred thousand dollars, with a proviso that the bonds should not be disposed of for less than their par value.

The act further required the city council to collect an annual tax, after being notified by the commissioners of the issuance of said bonds, for the purpose of paying the interest on the same, and to pay the proceeds of such tax over to the commissioners.

The board of commissioners was required to elect a president, secretary and treasurer, and to appoint a proxy to vote the city stock. It was also authorized to sell the city stock and pay the city bonds or invest the proceeds of sale in the bonds of the United States. Vacancies in the board were to be filled by the Circuit Court of LaSalle county.

The court will perceive that by this amendment of the city charter the whole subject of using the money or credit of the city to aid in the creation of a water power was committed to a board of commissioners, named by the legislature, and to their successors in office, to be appointed by the Circuit court, and that the commissioners or the city were only authorized to *subscribe to the stock* of the manufacturing company, and not to make a *donation* to the company.

On the 15th of June, 1869, the city council of Ottawa passed an ordinance authorizing the mayor to borrow,

upon the bonds of the city, the sum of sixty thousand dollars, "to be expended in developing the natural advan- "tages of the city for manufacturing purposes."

This ordinance was ratified at a popular election held on the 20th of July, 1869. On the 30th of the same month another ordinance was passed to provide the means of carrying into effect the previous ordinance. It directed the mayor to issue bonds to the amount of sixty thousand dollars and deliver them "to William H. W. Cushman, to "be used by him in developing the natural resources and "*surroundings* of the city," and authorized said Cushman "to expend the same in the improvement of the "water power upon the Illinois and Fox rivers within the "city, *and in the immediate vicinity thereof, under the fran-* "*chises and powers which have been granted for that pur-* "*pose*, in the manner which, in his judgment, shall best "secure the practical and permanent use of said water "power in the city and its immediate vicinity."

The ordinance further provided that Cushman should execute and deliver to the mayor his obligation that he would, without unreasonable delay, and by proper appliances, "bring into use all the available water of the two "rivers at Ottawa, as fast as it might be required for "actual use, and as fast as it could be leased at fair and "reasonable rates, the intent of this ordinance being to "secure the improvement and development of said water "power in this city by appropriating the loan obtained "under the ordinance aforesaid for that purpose, or *pro* "*rata* so far as said water power shall be made available "for practical use." The ordinance further provided that Cushman should bind himself to return the bonds, and save the city harmless from all loss, if the work should not be constructed.

It further appears, by the findings, that the Board of Commissioners, created by the act of February 15, 1876, was duly organized by the election of the proper officers; and after the passage of the ordinance of July 30, 1869, authorizing the issue of the bonds in question, the city council passed a resolution requesting the commissioners to subscribe to the stock of the manufacturing company, and appointed a committee to confer wtth the commissioners, but the commissioners did not subscribe to said stock, or concur in issuing said bonds; but, in the language of the finding, the bonds "were issued and de-"livered by the mayor and clerk of said city of Ottawa, "and not by the commissioners created by said act of the "legislature, and without being placed in the hands of the "said commissioners aforesaid, appointed under the above "recited act, approved March 10, 1867, and were issued "and delivered to the said Cushman, and there was no "consent of said commissioners to the issue of said bonds, "and said commissioners took no part in the issue of said "bonds."

The bonds were issued to W. H. W. Cushman, named in the act creating the "Manufacturing Company" as its first incorporator; and the only consideration received therefor was an agreement on his part, set out at length in the proceedings, that he would construct a good and substantial dam across the Illinois river and Fox river, and such head and tail races as might be necessary to make the water power available, and, in case of failure to make the water power available, he would return the bonds or the value thereof to the city, and keep it harmless on its bonds.

The contract further provided that "nothing in this "contract, nor in the ordinances therein referred to, shall

"give to said city any right, title, interest or ownership, "whether in law or in equity, in the said improvement, "when completed, according to the conditions and stipu- "lations herein contained."

It further appeared by the findings that Cushman, having received the bonds, delivered them without endorsement or consideration, to the Ottawa Manufacturing Company, of which he was a director, and that that company sold them to Lester H. Eames, a citizen of Ottawa, for their face value, and a part of the accrued interest, and the court further found that "Eames knew of the proceedings "of the common council in regard to the issuing of the "bonds, and knew that they were issued for the purpose "of being used as a donation to aid in the completion of "the contemplated improvement referred to in the contract "between Cushman and the city, and from the fact and "circumstances I find that he knew of the contract between "the city and Cushman in relation to the said bonds."

It further appears from the findings, that said contract with Cushman expressly sets forth that said bonds are to be used in creating a water power for *manufacturing purposes*, and that Eames and Carey, at the time of making said contract, were acquainted with that fact.

It further appears from the findings that said Eames sold the bonds to the present plaintiff after their maturity; and the court finds that the plaintiff not only took the bonds after maturity, but that he had the same knowledge of the purpose for which said bonds were issued and to which they had been applied, that the court found against Eames.

The court further found that the "Ottawa Manufac- "turing Company at once entered upon the work of con-

"structing the dams and races, and partially constructed "the same under the powers granted to it as above set "forth, and completed said work, so that some water "power was created, but that said dam was carried away "by a freshet in 1872 or 1873, and has never been recon- "structed."

THE FOLLOWING IS, IN FULL, THE FINDINGS OF FACT BY THE COURT.

Be it remembered that heretofore, to wit, on the 23rd day of February, A. D. 1881, the above entitled cause came on for trial, and it was then and there agreed by and between the plaintiff and defendant, by an instrument of writing, signed by the respective counsel, and filed in said cause, that a jury should be waived, and said cause should be submitted to the court for trial, and the parties having also agreed that any and all defenses to said action, which would be admissible under any special plea herein, should also be admitted under the general issue, and the court having heard all the evidence in said cause, doth find the following facts:

FIRST. The City of Ottawa, defendant herein, has been from the 10th day of February, A. D. 1853, a city of the State of Illinois, incorporated under a charter which, among other things, contains the following:

"Article 5, Section 1. The city council shall have "power and authority to levy and collect taxes upon all "property, real and personal, within the limits of the city, "not exceeding one-half of one per cent. per annum upon "the assessed value thereof, and may enforce the payment "of the same in any manner to be prescribed by ordinance

"not repugnant to the constitution of the United States, "and of this state."

"Article 5, Sec. 3. The city council shall have power "* * * * * * to establish, support and regulate "common schools, to divide the city into school districts, "to borrow money on the credit of the city, and to issue "bonds therefor, and pledge the revenue of the city for "the payment thereof, provided, that no sum or sums of "money shall be borrowed at a greater interest than at "ten per cent. per annum."

"Article 10, Sec. 20. No money shall be borrowed "by the city council until the ordinance passed therefor "shall be submitted to, and voted for, by a majority of "the voters of said city, attending an election held for "that purpose."

SECOND. That said charter has been amended from time to time, as follows: By an act approved March 1, 1854, entitled "An act to amend the charter of the City "of Ottawa, authorizing said city to take stock in a bridge "company therein named, and providing that the cor- "porate authorities of said city may levy a tax therein for "the purpose of paying the interest upon any bonds or "other securities issued by the city for that purpose; said "tax shall be levied as other taxes for said city purposes "are, or may by law be, required to be."

Also, by an act entitled, "An act to authorize the City "of Ottawa to subscribe to the stock of the Ottawa "Manufacturing Company," as follows:

"*Be it enacted by the people of the State of Illinois, rep-* "*resented in the General Assembly:*

"SECTION 1. That William Reddick, Milton H. Swift, "Jeremiah Wood, George Avery and Richard Thorne,

"be and they hereby *are* constituted a board of commis-
"sioners for and on behalf of said city, to subscribe to the
"capital stock of the Ottawa Manufacturing Company
"the sum of one hundred thousand dollars, and, when
"fully paid, to receive and hold the stock of said company
"for the same, and the proceeds thereof for and on behalf
"of said city.

"SEC. 2. In order to raise the money to enable said
"commissioners to make such subscriptions, they are
"hereby authorized, for and on behalf of said city to
"make, execute and dispose of bonds of the same to the
"amount of one hundred thousand dollars, in sums of not
"less than one thousand dollars, at a rate of interest not
"exceeding ten per centum per annum, payable in not less
"than ten years, irrevocably pledging the faith and re-
"sources of said city for the ultimate redemption of the
"same, and for the payment of the interest thereon. Such
"bonds shall not be disposed of by said commissioners for
"less than their par value.

"SEC. 3. The city council of said city is hereby author-
"ized and required annually after being notified by said
"commissioners of the issuance of such bonds, to levy and
"collect as other taxes are levied and collected, and at the
"same time and in the same manner, not less than six mills
"on each dollar of the assessed value of the real and per-
"sonal property in said city. The proceeds of such tax to
"be paid over by the collector of said city to the treasurer
"thereof, and by him kept as a separate fund subject to
"the order of said commissioners for the payment of the
"interest on said bonds, and in case of a surplus, the said
"commissioners shall invest the same in bonds of the
"United States, or of the State of Illinois, for the ultimate
"redemption of such bonds.

"SEC. 4. The said commissioners may appoint a presi-
"dent, and a secretary who shall be treasurer. The latter
"shall give bonds to said city, conditioned for the faithful
"discharge of his duties, and they may also appoint a
"proxy to vote on said stock at any meeting of the
"stockholders of said company, and instruct such proxy
"in what manner to vote, but no vote shall be given on
"said stock for either of such commissioners for direc-
"tors of said company.

"SEC. 5. Said commissioners may at any time dis-
"pose of such stock at not less than its par value, and
"any holder of any such bonds may at any time ex-
"change the same for an equal amount of said stock. In
"case of a sale of said stock, or of any portion of the
"same, the said commissioners shall, if practicable, take
"up said bonds, and if not, shall invest the proceeds in
"bonds of the United States, or the State of Illinois.
"Said commissioners shall keep a record of their pro-
"ceedings, and annually report to the city council their
"doings herein. Said commissioners shall be allowed all
"reasonable expenses, but no compensation for their ser-
"vices. In case of a vacancy in said board, by death,
"resignation, refusal or neglect to act, or removal from
"the county of LaSalle, the Circuit Court of said county
"shall fill such vacancy.

"Approved, February 19th, 1867."

Also by an act to amend an act entitled: "An act to
"charter the City of Ottawa, approved February 10,
"1853," as follows:

"Section 1, Chapter 2. When the bonds now held
"against the city of Ottawa shall become due, the city
"council of said city are hereby authorized to cause other

" bonds, for the same sum or sums, and on the same terms " and for such time as the city council may deem proper, to " be issued and delivered to the holder of said bonds now " held against said city. And the city council are hereby " authorized, in addition to the taxes now authorized to be " levied and collected by said city, to levy and collect in " the same manner and at the same time as other city taxes " are levied and collected, a tax not exceeding two mills " on each dollar of the assessed value of the real and per- " sonal property in said city, said tax, when collected, to " be paid to the city treasurer, and by him to be kept " as a separate fund to pay off the bonds so held against " said city. Said separate funds may be invested in bonds " of the United States or of this state."

[Note by counsel. It will be observed this act was passed two years before the bonds in question were issued.]

" Approved March 5, 1867."

THIRD. That on or about the first day of July, A. D. 1867, the commissioners appointed by the said act of February 19, A. D. 1867, viz: William Reddick, Milton H. Swift, Jeremiah Wood, George Avery and Richard Thorne, met and duly organized as such board of commissioners, by electing Milton H. Swift president and John F. Nash secretary of said board of commissioners.

That after the organization of said board of commissioners, and prior to the 15th day of June, A. D. 1869, the city council took steps to secure a subscription by the said board of commissioners to the capital stock of said Ottawa Manufacturing Company, and to secure shares of its stock therefor, under said act of February 19, 1867, but said

board of commissioners failed to make such subscriptions and to procure such stock in that behalf.

FOURTH. That on the 15th day of February, 1851, the legislature of the State of Illinois passed an act entitled "An Act to authorize certain persons to construct a dam "across Fox river for hydraulic and manufacturing pur- "poses," which act was as follows:

"*Be it enacted by the People of the State of Illinois, "represented in the General Assembly:*

"SEC. 1. That William H. W. Cushman, George E. "Walker, John V. A. Hoes, George H. Norris, Lorenzo "Leland and Henry G. Cotton, or such of them, or such "other persons as may choose to associate with them, by "subscribing to the stock of the company as hereinafter au- "thorized, are hereby created a body corporate and politic "by the name of the 'Ottawa Manufacturing Company,' "and by that name shall have perpetual succession, and "be capable of contracting and being contracted with, of "suing and being sued, of acquiring either by purchase or "under the provisions of this act, as hereinafter authorized, "and of holding real estate and personal property, for the "purposes contemplated and authorized by this act, or in "discharge of debts due the said corporation, and of using "and disposing of the same; may have a common seal, "which they may alter at pleasure, and may make all "needful by-laws for the government of the company, its "officers, and the management of its affairs, and alter the "same at pleasure; may appoint or provide for the election "of such officers and agents as may be deemed necessary, "and prescribe the duties and liabilities of all the officers "of said company.

"SEC. 2. The said company, when formed, are hereby

"authorized to build a dam across Fox river, on section "11 or 12, in Township 33, North of Range 3 East, in "LaSalle county, for the purpose of creating a water-"power, and the said company may use, lease or other-"wise dispose of the same, and may construct such other "works, buildings and machinery as may be deemed "necessary or proper to use such water, and to promote "the interests and objects of the company.

"SEC. 3. The said company, having first obtained "the assent of the corporate authorities of the town of "Ottawa, may use any of the streets, alleys or public "grounds in the said town for the purpose of creating "such power, or of using or applying the same, as herein "provided and authorized.

"SEC. 4. The capital stock of said company shall not "exceed $50,000, which shall be divided into shares of "one hundred dollars each.

"SEC. 5. The persons named in the first section of "this act, or a majority of them, or of the survivors of "them, if any shall die, may cause books of subscription "to the capital stock of said company to be opened at "some public place, after having given notice of the "same for at least thirty days, by publication in some "newspaper printed in said county. Any person may "become a stockholder in said company, by subscribing "at least one share and paying for the same, and all "assessments thereon, when called for. Each share shall "be entitled to one vote in all proceedings or election of "said company, which may be given in person or by "proxy.

"SEC. 6. After five thousand dollars of the stock of "said company shall be subscribed, and ten per cent.

"thereon paid in, an election may be held for not less "than three, nor more than seven directors, of which the "same notice shall be given as required in section 5; at "the same time and place such articles of association and "by-laws as may be deemed best for the goverment of "the company and its officers, and the management of its "affairs, may be adopted.

"SEC. 7. The directors shall hold their offices for one "year, and until their successors are chosen, which may "be provided for in the articles of association, or by-laws "of said company. The directors shall have the manage- "ment of all the business of said corporation, the applica- "tion of its funds, the disposition of its property, and "shall make all contracts and conveyances; all of which, "however, shall be in accordance with the articles of "association and by-laws of said corporation.

"SEC. 8. The said corporation, for the purposes herein "expressed and authorized, may enter upon and take or "flow any real estate deemed necessary, provided that the "said company shall pay the value of such real estate and "damage done by flowing or injuring lots or lands by the "erection of the said dam, or any of the works of the "company.

"For the purpose of ascertaining the value of such real "estate, or the amount of such damage, the said company "may apply by petition to the circuit or county court of "said county, in which petition shall be set forth the "point, as near as may be, at which the said company pro- "pose to build the said dam, or at which the same is built, "and the height to which they propose to erect or have "erected the same above low or the ordinary stage of "water in said river, the property, particularly describing

"it, taken or proposed to be taken for the purposes herein "authorized, or to be flowed, occupied or injured by the "works of said company. Notice shall be given of the "filing of such petition, or of the intention so to do, per- "sonally to the owners, if known, and by publication in at "least two newspapers in said county, once in each week "for six weeks, stating in said notice the facts required to "be set forth in the petition, the last of which publications "shall be at least sixty days prior to the day on which "said petition was heard or acted upon by said court. "Any person owning or having an interest in such real "estate, or any part thereof, may upon application and by "filing in court a statement of such ownership or interest, "verified by his or her affidavit, be heard in such pro- "ceedings. Upon the hearing of such petition the said "court shall appoint five commissioners, who shall be dis- "interested, and who shall take an oath faithfully to dis- "charge the duties of their office, any three of whom "shall be competent to act. The said commissioners or a "majority of them, shall at such time and place as the said "court may direct, proceed to examine and estimate the "value of such real estate, as is proposed to be taken, and, "the injury which may be done by the said dam or works "of the said company to the real estate flowed, or to "be flowed, or injured thereby. The said commissioners "may administer oaths and hear any evidence offered, "and may personally inspect the property, and in esti- "mating the damages shall consider the benefits to result "from the works of said company. The commissioners "shall report to said court, stating the value of such real "estate, and the damages, setting forth the value of all "damages to each parcel of real estate separately; the "said court upon receiving such report shall make an

"order condemning such real estate to the use of said com-
"pany or its works, and the company shall thereupon, on
"demand, pay to the persons legally entitled thereto, the
"amount so ascertained, provided the said court may, for
"good cause shown, order re-assessment of the value or
"damages of such real estate or any portion thereof; the
"said company shall also pay all the costs of the pro-
"ceedings.

"SEC. 9. Any person owning lands taken, flowed or
"injured, may in like manner, apply to said court to have
"the value of the same, or the injury thereto ascertained,
"but no other or further proceedings shall be had against
"said company.

"SEC. 10. This act shall be considered a public act.
"Approved February 15th, 1851."

FIFTH. That on the sixteenth day of February, A. D. 1865, the legislature of the State of Illinois passed another act entitled "An act to amend an act, entitled "'An act to authorize certain persons to construct a dam "across Fox river, for hydraulic and manufacturing pur-"poses,' approved February 15th, 1851," which said act is as follows:

"*Be it enacted by the People of the State of Illinois, rep-*
"*resented in the General Assembly:*

"SEC. 1. That the said company shall have, in addi-
"tion to the powers granted in and by said act, to which
"this is an amendment, the right for all of the pur-
"poses mentioned in the said act, to build a dam across
"the Illinois river, at such point as the said company may
"elect, and also the right to construct a race or races for
"the purpose of introducing the water of the Illinois

" river into the pool of the dam authorized to be erected " across Fox river, and for any or all the purposes con- " templated by this act, and by the act to which this is an " amendment, may take and use such portion of any high- " way, street, alley, or public ground, as may be deemed " necessary.

" SEC. 2. Section 9 of the act to which this is an " amendment is hereby amended by adding at the end of " the same the following: 'Provided that no action or " other proceeding shall be had against said company on " account of the erection of said dam, race or races, un- " less within one year after the erection or construction " of the same or any or either of them.'

" SEC. 3. The 4th section of said act, to which this is " an amendment, shall read as follows: 'The capital " stock of said company may be fixed by the same, and " divided into shares, and may be increased or dimin- " ished.'

" SEC. 4. The name of 'Henry G. Cotton,' in the first " section of said original act, is stricken out, and the " names of 'Dwight Cameron' and 'John F. Nash' are " hereby inserted in its stead.

" Approved February 16th, 1865."

SIXTH. That on the 15th day of June, 1869, the City of Ottawa adopted the following ordinances:

First. " An ordinance to provide for a loan for mu- " nicipal purposes.

" SEC. 1. Be it ordained by the city council of the City " of Ottawa that the mayor of the city be and he is " hereby authorized to borrow in the name of the city, at

" a rate of interest not exceeding 10 per cent., the sum of " $60,000, for the use of said city, to be expended in de- " veloping the natural advantages of the city for manufac- " turing purposes, and that bonds of the city be issued " therefor in the sum of $500.00, with interest payable " annually, said bonds to be payable one-third in five " years, one-third in ten years, and one-third in fifteen " years after the date thereof, provided that no application " shall be made of the proceeds of said bonds except for " the purpose aforesaid, and in pursuance of an ordinance " to be passed for that purpose by the city council, nor " until the faithful application of the proceeds of such " bonds to the purpose aforesaid shall be fully secured to " the city.

" SEC. 2. Be it ordained that a sufficient sum to pay " the interest on said loan shall be annually provided by " taxation, and set apart as a separate fund, and to be ap- " plied to the payment of the interest on said bonds, and " for no other pnrpose.

" SEC. 3. This ordinance shall be submitted to the " voters of the city to be voted for or against at an elec- " tion to be held for that purpose on the 20th day of July, " 1869. The matter of the determination shall be by de- " positing ballots upon which shall be written or printed " ' For the loan ordinance ' or ' Against the loan ordi- " nance.' "

Second. On the 30th day of July, 1869, an ordinance to carry into effect the ordinance of June 15, 1869, entitled " An ordinance to provide for a loan for municipal " purposes," as follows:

" WHEREAS, by an ordinance passed by the city council

"on the 15th of June, 1869, it was provided that the "mayor of the city should be authorized to borrow in "the name of the city $60,000, to be expended in devel- "oping the natural advantages of the city for manufac- "turing purposes, and to issue the bonds of the city "therefor; and whereas, it was provided by said ordi- "nance that the same shall be submitted to the voters of "the city, to be voted for or against at an election to be "holden for that purpose on the 20th day of July, 1869; "and whereas, at said election, the said ordinance was "ratified by the voters of the city by a majority of 823 "votes, being a majority of the legal voters of the city;

"NOW, THEREFORE, be it ordained by the city council "of the City of Ottawa, that the bonds of the city for "the sum of $60,000, be issued by the mayor in accord- "ance with the terms and conditions of said ordinance of "June 15th, 1869, and that he deliver the same to William "H. W. Cushman, to be used by him in developing the "natural resources and surroundings of the city, and that "the said Cushman is authorized and directed to expend "the same in the improvement of the water-power upon "the Illinois and Fox rivers within the city and in the "immediate vicinity thereof, under the franchises and "powers which have been granted for that purpose by "the legislature of the state, or which may hereafter be "granted for that purpose in the manner which in his "judgment shall best secure the practical and permanent "use of said water-power in the city and its immediate "vicinity; provided, that said Cushman shall execute "and deliver to the mayor an agreement from him to the "City of Ottawa that he will, without unreasonable or un- "necessary delay, cause a good, substantial and sufficient "dam to be constructed across the Illinois river above the

"city, to bring into use all the available water-power of "said river at Ottawa, and will construct sufficient head "and tail races to make such water-power available; said "races to be constructed and continued to the Fox river "below the aqueduct and above the island in Fox river, "as fast as the same may be required for actual use, and "as fast as said water-power can be leased at fair and "reasonable rates, and be brought into actual operation, "and that he will also erect a good, substantial and suffi-"cient dam across Fox river so as to make available the "water-power of both rivers at Ottawa, as soon as the "additional water-power created by such dam across Fox "river can be brought into actual use by being leased at "reasonable and fair rates, so as to have all of the avail-"able water-power of both rivers at Ottawa ready for use "as rapidly as called for. And provided, also, that said "Cushman shall bind himself that if said work is not con-"structed as aforesaid, that he will return said bonds to "the city, or the value of the same, and save it harmless "from all loss on account of the same, or on account of "interest accruing thereon, and in case said work shall "not be completed by said Cushman, then to return the "*pro rata* share of said bonds in the proportion that the "cost of the work constructed shall bear to the part of "the work not constructed; provided that at least one of "the dams above mentioned, with the races necessary to "make the water power thereby created available for "practical use shall be completed, or the whole of said "bonds shall be returned to the city by said Cushman.

"The intent of this ordinance being to secure the im-"provement and development of said water powers in this "city, by appropriating the loan obtained under the ordi-"nance aforesaid for that purpose, or *pro rata*, so far as

"said water power shall be made available for practical "use."

That under said ordinance of June 15, an election was held, and a majority of the voters of Ottawa voted in favor of issuing said bonds.

In addition to the foregoing ordinances, the following proceedings of the city council of the City of Ottawa, in relation to said bonds, were had, and the agreement with said Cushman, as appears from the records of said city council. On the 14th day of June, 1870, at a regular meeting of said city council, * * * * "on "motion of Fiske, ordered that a committee consisting of "the mayor and three aldermen be appointed to wait on "W. H. W. Cushman, and ascertain from him positively "and definitely at what time he proposed to commence the "work of the improvement of the water power in the vi- "cinity of Ottawa, as per contract between him and the "City of Ottawa."

July 12, 1870, at a regular meeting of said council the special committee appointed to confer with W. H. W. Cushman in relation to the contract between him and the City of Ottawa, in the matter of the improvement of the water power in the vicinity of Ottawa, reported that "the committee had waited on Mr. Cushman, and from him had received the positive assurance that the stakes were now stuck; that all the arrangements for the prosecution of the work are now perfected, and that before one year from this date the water would be pouring over the dam, contracted to be constructed across the Illinois river."

And also the following proceedings of the city council of the city of Ottawa, in relation to said bonds, viz:

"Tuesday, May 11, 1869. Regular meeting; present,

"Mayor Shuler and aldermen Fiske, Thomas, Freeman, "Bunker, Hughes, Leonard, Clifford, Colwell, Osman, "Burke, Bosserman, Moore and Calkins. * * * * "Colwell submitted the following resolution, which was, "on motion of Calkins, adopted:

"*Resolved*, That the commissioners appointed to take "stock for the City of Ottawa, to the amount of $100,000, "in the Ottawa Manufacturing Company, be requested to "take such stock in the corporation created by the act "entitled 'An Act to incorporate The Ottawa Manufac- "turing Company, and to authorize said company to build "a dam across the Illinois river, and to use the water "power thereby created.' Approved Feb'y, 1851, "which was revived and amended by a supplementary "act approved Feb'y 16, 1865.

"Provided said corporation will organize and open its "books for subscriptions immediately; and, provided fur- "ther, that it will commence improving the water power "at the earliest moment practicable.

"On motion of Colwell, ordered that a committee of "three be appointed to confer with the Ottawa Manufac- "turing Company in relation to the provisions as in resolu- "tion directing commissioners to take stock for the city of "Ottawa, to the amount of $100,000 in said company

"Mayor Shuler appointed Colwell, Osman and Fiske "said committee."

SEVENTH. That the bonds set out in the declaration were issued according to their date and face, as set forth in the declaration, and delivered to William H. W. Cushman, on the 2d day of August, 1869, under the following agreement:

"THIS AGREEMENT, made this second day of August,

"A. D. 1869, between William H. W. Cushman, of Ot-
"tawa, Illinois, party of the first part, and the city of
"Ottawa, in the county of LaSalle, Illinois, party of the
"second part, witnesseth, that whereas, the said Cushman
"has received from the City of Ottawa, aforesaid, the
"bonds of the city, to the amount of sixty thousand dol-
"lars, to be used in developing the natural resources of
"the city for manufacturing purposes, and to be expended
"in the improvement of the water power upon the Illinois
"and Fox rivers, within the city and in the immediate
"vicinity thereof, said bonds having been issued by said
"city in pursuance of an ordinance passed by the city
"council of said city on the 15th day of June, 1869, enti-
"tled 'An ordinance to provide for a loan for municipal
"purposes,' which was ratified by the voters of the city
"on the 20th day of July, 1869, and of an ordinance
"passed by the city council of said city on the 30th day
"of July, A. D. 1869, entitled 'An ordinance to carry
"into effect the ordinance of June 15th, 1869, entitled
"'An ordinance to provide for a loan for municipal pur-
"poses.'

"NOW, THEREFORE, in consideration of the premises,
"the said William H. W. Cushman, for himself, his heirs,
"executors and administrators, doth by these presents
"covenant and agree to and with the City of Ottawa,
"aforesaid, that he will, without unreasonable or unneces-
"sary delay, cause a good and substantial dam to be con-
"structed across the Illinois river, above the city, suffi-
"cient to bring into use all the available water power of
"said river at Ottawa, and will construct sufficient head
"and tail races to make such water power available, said
"races to be constructed and continued in Fox river below
"the aqueduct and above the island, as fast as the same

"may be required for actual use, and as fast as the water "power can be leased at fair and reasonable rates, and "that he will also construct a good, substantial and suffi- "cient dam across the Fox river, below the aqueduct, "whenever the same shall be necessary to make available "the water power of both rivers at Ottawa, and be nec- "essary for the use of said water power, and whenever "the said water power made available by the construc- "tion of said dam across Fox river can be leased at fair "and reasonable rates, so as to have all of the available "water power of both rivers at Ottawa ready for use as "rapidly as called for; and said Cushman also binds him- "self, his heirs, executors and administrators, to and with "said city, that in case said work is not performed to the "extent of constructing a dam across the Illinois river, "and races to make water power thereby created avail- "able for practical use, that he will return said bonds, or "the value thereof, to the city, and save and keep harmless "the said city from all loss on account of the same, or on "account of the interest accruing thereon, and in case the "work shall be performed to the extent above indicated, "but shall not be completed by the construction of all the "dams and races heretofore specified, then said Cushman "shall return to said city a *pro rata* share of said bonds, "or the value thereof, in proportion that the cost of the "work constructed shall bear to the cost of that part of "the work not constructed. The said Cushman to be "exonerated from all liability of any kind to the city or on "account of said bonds, when he shall have performed "the agreements herein expressed to be performed by "him at the time stipulated for the performance of the "same, the bonds being appropriated by the city to se- "cure the completion of said work, and without other con-

"sideration than the public benefit resulting to the city "thereby; and it is hereby agreed that nothing in this "contract, nor in the ordinances therein referred to, shall "give to said city any right, title, interest or ownership, "whether in law or in equity in the said improvements "when completed, according to the conditions and stipu- "lations herein contained.

"IN WITNESS WHEREOF, the said William H. W. Cush- "man set his hand and seal the day and year above "written.

"WILL H. W. CUSHMAN."

And the said City of Ottawa received no stock in said manufacturing company, or other consideration for said bonds, other than the said contract with said Cushman hereinbefore set out, but the same was issued as a donation by the City of Ottawa to said Cushman, to be applied by said Cushman individually, or under such franchises as were or might be granted for the purpose of making said improvement, and the same were issued and delivered by the mayor and clerk of said City of Ottawa, and not by the commissioners created by said act of the legislature, and without being placed in the hands of the commissioners aforesaid, appointed under the above recited act, approved March 19, 1867, and were issued and delivered to said Cushman, and there was no consent of said commissioners to the issue of said bonds, and said commissioners took no part in the issue of said bonds.

EIGHTH. That no money whatever was borrowed by the mayor of the City of Ottawa under and by virtue of the said ordinances of the city of Ottawa, passed June 15, 1869, and July 30, 1869, but said bonds of the City of Ottawa were, on the 2d day of August, A. D. 1869, executed and delivered to the said Wm. H. W. Cushman, by

said mayor, as a donation to aid in securing the contemplated water power in the city and its immediate vicinity, as hereinbefore set forth.

NINTH. That on the eleventh day of March, A. D. 1871, the said Wm. H. W. Cushman delivered the said bonds to the said Ottawa Manufacturing Company, to be used by the said company for the purpose of making the improvement hereinbefore mentioned, and without further consideration and without his endorsement thereon, said Cushman being at the time a director in said Ottawa Manufacturing Company.

TENTH. That said Ottawa Manufacturing Company at once entered upon the work of constructing the dams and races, and partially constructed the same under the powers granted to it as above set forth, and completed said work so that some water power was created, but that said dam was carried away by a freshet in 1872 or 1873, and has never been reconstructed.

ELEVENTH. That during the month of June, A. D. 1871, the Ottawa Manufacturing Company sold and delivered, without any endorsement whatever, the bonds described in the declaration in this cause, to Lester H. Eames, a citizen of the City of Ottawa, for their face value and part of the interest which had accrued after August, 1870. That the City of Ottawa paid the interest on the bonds in suit due August 2d, 1870, and August 2d, 1871.

TWELFTH. That Eames knew of the proceedings of the common council in regard to the issue of the bonds and knew that they were issued for the purpose of being used as a donation to aid in the completion of the con-

templated improvement referred to in the contract between Cushman and the city, and from the facts and circumstances, I find that he knew of the contract between the city and Cushman in relation to the said bonds.

THIRTEENTH. That Eames, at the time he purchased the bonds, read the recitals contained therein, and had never heard their validity questioned.

FOURTEENTH. I further find that the question as to the policy of issuing the bonds, and as to their validity, was the subject of discussion by the people and the press of said city at about the time of their issue.

FIFTEENTH. And when said bonds were read in evidence, they were objected to by the defendant, because they had not been endorsed by the payee therein named, but the court admitted the same, and the defendants excepted thereto.

SIXTEENTH. That in the month of November, A. D. 1879, and after the bonds fell due, the said Lester H. Eames sold and delivered said bonds, without any endorsement, to William H. Carey, for value, the plaintiff in this cause, who then knew all the facts in regard to the purpose for which said bonds were issued, and to which they had been applied, that I have hereinbefore found were known to Eames at the time he, Eames, purchased the same.

Upon the findings of the foregoing facts, the court finds the issue for the plaintiff, and finds the debt $50,900, and the damages $21,914.76, for which the court renders judgment for the plaintiff; to which finding of the issue and judgment the defendant at the time excepted. And

the court orders the foregoing findings to be made a part of the record.

H. W. BLODGETT, *Judge.*

It is agreed that this certificate is correct.

MOLONEY & RICHOLSON.

G. S. ELDREDGE.

(Endorsed):

Filed July 15, 1881.

WM. H. BRADLEY, *Clk.*

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1882.

CITY OF OTTAWA,
Plaintiff in Error,

vs.

WILLIAM H. CAREY,
Defendant in Error.

Error to Circuit Court,
Northern District
of Illinois.

RE-ARGUMENT FOR PLAINTIFF IN ERROR.

LAWRENCE, CAMPBELL & LAWRENCE,
AND
M. T. MOLONEY,
For Plaintiff in Error.

C. B. LAWRENCE,
Of Counsel.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

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Defendant in Error.

Error to Circuit Court, Northern District of Illinois.

RE-ARGUMENT FOR PLAINTIFF IN ERROR.

ERRORS ASSIGNED.

I. The court erred in finding the issue for the plaintiff.

II. The court erred in not finding the issue in favor of the defendant.

III. The court erred in receiving in evidence the bonds sued upon, without an endorsement by the payee therein named.

IV. The court erred in rendering judgment in favor of the plaintiff, in manner and form aforesaid.

V. The court erred in not rendering judgment in favor of the defendant.

VI. General assignment.

BRIEF.

On the foregoing facts we submit to the court the following five propositions:

I.

THE LEGISLATURE OF ILLINOIS COULD NOT, UNDER THE CONSTITUTION OF THE STATE, AUTHORIZE A TOWN OR CITY TO ISSUE ITS BONDS FOR ANY BUT CORPORATE PURPOSES, AND A DONATION OF BONDS TO A PRIVATE CORPORATION, ESTABLISHED FOR THE PURPOSE OF CREATING A WATER POWER TO BE OWNED EXCLUSIVELY BY SUCH PRIVATE CORPORATION, WAS NOT AN ISSUE OF BONDS FOR A CORPORATE PURPOSE, AND SUCH BONDS, IN THE HANDS OF A PURCHASER WITH NOTICE, ARE VOID.

AUTHORITIES.

Town of South Ottawa v. *Perkins*, 4 Otto, 262.
People v. *Depuyt*, 71 Ill., 653.
Pendleton County v. *Amy*, 13 Wall., 304.
Kenicott v. *Supervisors*, 16 Wall., 452.
St. Jo. Township v. *Rogers*, 16 Wall., 644.
Town of Coloma v. *Eaves*, 2 Otto, 484.
Rogers v. *Burlington*, 3 Wall., 671.
Supervisors v. *Weider*, 64 Ill., 427.
Livingston County v. *Neider*, 64 Ill., 432.
Johnson v. *County of Stark*, 24 Ill., 75.

Bissell v. *City of Kankakee*, 64 Ill., 251.
English v. *The People*, 96 Ill., 569.
Loan Association v. *Topeka*, 20 Wall., 655.
Lowell v. *Boston*, 111 Mass., 460.
People v. *Bacheller*, 53 N. Y., 143.
Jones on R. R. Securities, Sec. 123, *et seq.*
Ohio Valley Iron Works v. *Moundsville*, 11 W. Va., 1.
Wilkesbarre City Hospital v. *County of Luzerne*, 84 Pa. St., 55.
Osborn v. *The County of Adams*, and
City of Parkersburgh v. *Brown*, decided at present term of this court.

II.

IF THESE BONDS HAD BEEN ISSUED FOR A CORPORATE PURPOSE, THE BONDS, IN ORDER TO BE VALID, SHOULD HAVE BEEN ISSUED BY AUTHORITY OF THE BOARD OF COMMISSIONERS SPECIALLY APPOINTED BY THE LEGISLATURE TO TAKE CHARGE OF THIS WHOLE MATTER--TO SUBSCRIBE THE STOCK, AND TO ISSUE AND SELL, AT PAR, THE BONDS OF THE CITY TO RAISE THE MONEY FOR ITS PAYMENT.

AUTHORITIES.

Town of South Ottawa v. *Perkins*, 4 Otto, 269.
Township of East Oakland v. *Skinner*, 4 Otto, 258.
Middleport v. *Ætna Life Ins. Co.*, 82 Ill., 562.

Supervisors v. *People ex rel. R. R. Co.*, 25 Ill., 181.
Gaddis v. *Richland Co.*, 92 Ill., 119.
Brush v. *Ware*, 15 Pet., 93.
McClure v. *Oxford*, 4 Otto, 432.

III.

EVEN IF THE BONDS HAD BEEN ISSUED FOR A CORPORATE PURPOSE, AND IF THEY HAD BEEN ISSUED BY THE PROPER AUTHORITIES, VIZ: THE BOARD OF COMMISSIONERS, THEY WOULD STILL BE UNCOLLECTIBLE BY THE PRESENT PLAINTIFF (A PURCHASER WITH NOTICE) BECAUSE THEY WERE ISSUED AS A *DONATION* TO A PRIVATE MANUFACTURING COMPANY, WHEREAS THE COMMISSIONERS WERE AUTHORIZED TO ISSUE THEM *ONLY IN PAYMENT OF A CORRESPONDING AMOUNT OF THE STOCK OF SAID COMPANY.*

IV.

EVEN IF THE BONDS HAD BEEN ISSUED FOR A CORPORATE PURPOSE, AND IF THEY HAD BEEN ISSUED BY THE PROPER AUTHORITIES, NAMELY, THE BOARD OF COMMISSIONERS, THEY WOULD STILL BE UNCOLLECTIBLE BY THE PRESENT PLAINTIFF, BECAUSE HE BOUGHT WITH NOTICE THAT THEY WERE ISSUED TO CUSHMAN IN CONSIDERATION OF HIS CONTRACT TO BUILD "A GOOD AND SUBSTANTIAL "DAM ACROSS THE ILLINOIS AND FOX RIVERS SUFFCIENT "TO BRING INTO USE ALL THE AVAILABLE WATER," AND TO PROTECT THE CITY ON THESE BONDS IN CASE HE DID NOT CREATE THE WATER POWER, WHICH CONTRACT HE WHOLLY FAILED TO PERFORM.

V.

THE STATUTE AUTHORIZED THE COMMISSIONERS TO SUBSCRIBE TO THE STOCK OF THE MANUFACTURING COMPANY, AND REQUIRED THEM TO "RAISE THE MONEY" FOR PAYMENT OF THE SUBSCRIPTION, BY ISSUING AND SELLING BONDS AT NOT LESS THAN PAR. THE MAYOR ISSUED THE BONDS DIRECTLY TO CUSHMAN FOR DELIVERY TO THE MANUFACTURING COMPANY. EVEN IF THE BONDS WERE OTHERWISE FREE FROM EXCEPTION, THIS DISPOSITION OF THEM WAS ILLEGAL.

AUTHORITIES.

Scipio v. *Wright*, 101 U. S., 665.

Middleport v. *Ætna Life Ins. Co.*, 82 Ill., 563.

ARGUMENT.

I.

THE LEGISLATURE OF ILLINOIS COULD NOT, UNDER THE CONSTITUTION OF THE STATE, AUTHORIZE A TOWN OR CITY TO ISSUE ITS BONDS FOR ANY BUT CORPORATE PURPOSES, AND A DONATION OF BONDS TO A PRIVATE CORPORATION, ESTABLISHED FOR THE PURPOSE OF CREATING A WATER POWER, TO BE OWNED EXCLUSIVELY BY SUCH PRIVATE CORPORATION, WAS NOT AN ISSUE OF BONDS FOR A CORPORATE PURPOSE, AND SUCH BONDS IN THE HANDS OF A PURCHASER WITH NOTICE, ARE VOID.

It is the settled law everywhere, that "a municipal "corporation cannot issue bonds in aid of extraneous "objects without legislative authority, of which all persons "dealing with such bonds must take notice at their peril." This is the language of Mr. Justice BRADLEY, speaking for this court in *Town of South Ottawa* v. *Perkins*, 4 Otto, 262.

But in this state municipal corporations cannot issue "bonds in aid of extraneous objects," even *with* legislative authority.

The fifth section of the ninth article of the constitution of 1848, in force at the time the law authorizing the city of Ottawa to subscribe to the stock of this manufacturing company was passed, read as follows:

"The corporate authorities of counties, townships, "school districts, cities, towns and villages, may be vested

"with power to assess and collect taxes for corporate "purposes."

This is the only provision of the constitution relating to this subject; and it has always been held to be a prohibition upon the legislature against granting the power of taxation to municipal corporations, *except for corporate purposes.*

The ruling of the Supreme Court of Illinois upon this question has been entirely uniform, and in the State of Illinois, a town or city has no more power to levy a tax for purposes non-corporate when authorized to do so by an act of the legislature, than it has such power when it attempts to exercise it without the aid of a legislative act. The legislature cannot bestow the power.

In the case of *People* v. *Dupuyt*, 71 Ill., 653, the Supreme court said:

"It has frequently been held by this court, and must "be regarded as well settled, that this clause of the con- "stitution is a limitation upon the taxing power of the "state; that taxation cannot be imposed by a corporation "except for local or corporate purposes." The court cites

Johnson v. *Campbell*, 49 Ill., 316.
Harward v. *St. Clair Drainage Co.*, 51 Ill., 130.
Madison County v. *The People*, 58 Ill., 456.

In *Harward* v. *St. Clair Drainage Co.*, the court, after citing the 5th section of the 9th article of the constitution, to the effect that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess taxes for corporate purposes, proceeds as follows:

"We believe it has always been understood that this "clause limited local or corporate taxation to local "or corporate purposes, and it has always been so "construed whenever its construction has come before "this court."

This position is distinctly conceded by the learned counsel on the other side.

Judge CATON, for many years a very able and distinguished judge of the Supreme Court of Illinois, filed in the present case an argument in support of the petition for re-hearing. On page 2 of the second part of that argument, we find the following language:

"The provision of the constitution which restricted the "legislative power in chartering cities, towns and other "muncipalities to authorizing them to levy taxes or borrow "money for municipal or corporate purposes only, is "familiar to the court and to the bar, and I shall not stop "to read it, for it is not denied or questioned.

It is thus distinctly conceded by our opponents that the constitution of Illinois prevents the legislature from authorizing municipalities to levy taxes or borrow money for any other than municipal or corporate purposes.

The question then arises, were the bonds in this case issued for a corporate purpose?

In *Pendleton County* v. *Amy*, 13 Wallace, 304, this court said: "Without legislative authority a municipal "corporation, like a county, may not subscribe to the "capital stock of a railroad company and bind itself to pay "its subscription or issue its bonds in payment; and if it "does, the purchaser of such bonds is affected by the want "of authority to make them."

This principle, that a municipality can not issue its

bonds in aid of a railway unless specially authorized thereto by the legislature, has often been asserted by this court.

Kenicott v. *Supervisors*, 16 Wall., 452.
St. Joseph Township v. *Rogers*, 16 Wall., 644.
Town of Coloma v. *Eaves*, 2 Otto, 484.

These cases establish the principle that the building of a railroad into a town is not a corporte purpose.

What is a corporate purpose? The question is answered in the dissenting opinion of Mr. Justice FIELD, in which the Chief Justice, Mr. Justice GRIER, and Mr. Justice MILLER, concurred, in the case of *Rogers* v. *Burlington*, 3 Wallace, 671.

The language is as follows:

"I might proceed and show that the purpose for which "the bonds in this case were issued, was not within the "objects to be accomplished by the charter of incorpo- "ration; that those objects were such as are usually con- "templated in the creation of a municipal corporation,— "the establishment of a local government, the securing "of peace, good order and health within the corporate lim- "its, and the promotion of such measures as would con- "duce to the general good of the municipality, and that "the power to borrow money was restricted to the pur- "poses declared. But it is unnecessary to pursue the "matter further."

In the opinion of the majority of the court, in the same case, we find this language:

"*None of the decided cases which maintain the power of "the state legislatures to authorize such material aid in*

"*the construction of railroads, decide, or even intimate,*
"*that the power may be exercised without limit, or be ex-*
"*tended to a public enterprise entirely foreign to the gen-*
"*eral objects which the corporation was created to subserve.*
"Those adjudications are not obnoxious to any such
"charge; but the theory maintained is, that a railroad is
"nothing more than an improved highway, and that it is
"as competent for the legislature to authorize a munici-
"pal corporation to furnish material aid in the construc-
"tion of a railroad connected with the same, as to con-
"struct a highway."

Here the majority of the court seem to intimate that to aid the building of a railway may be taxation for a municipal purpose, regarding a railway as an improved highway, but say that no case has "even intimated that the power "can be extended to a public enterprise entirely foreign to "the general objects which the corporation was created to "subserve."

As we have already remarked, this precise question was before this court at the October term, 1878, in *Hackett* v. *City of Ottawa*, but its decision was expressly reserved. The learned Justice who wrote the opinion and discussed this branch of the case to some extent in the light of the Illinois decisions, seemed rather to favor the proposition, that these bonds were issued for a corporate purpose. The learned Judge, in considering this question, attached some importance to the decisions of the State court sustaining the bonds issued during the late war to save municipalities from a draft by raising bounties for volunteers. We must again be permitted to say, as we said in the argument of the former case, that those decisions were rendered under a pressure of circumstances which should make us consider them as of such doubtful authority, that

at least we should guard against their being drawn into precedents for any extension of their principles. In the case of the *Board of Supervisors* v. *Weider*, 64 Ill., 427, the Supreme court of the State said, in commenting on these cases, "the court went far enough in upholding that "tax."

But we respectfully ask, how can these cases, supposing them to have been properly decided, sustain the bonds under consideration? There is an aspect in the former question in which a corporate purpose may be discovered in the object of the bonds. A town or city is created for the security of life and person, as well as property. For that purpose police officers, sheriffs and constables are created. Now, the raising of volunteers for the war, many of whom came from beyond the limits of the town offering the bounty, was a measure calculated to save the lives of the citizens of the town from exposure to wounds and death, and enabling them to remain where they could support their families, and thus, in many cases, save the town from the necessity of assuming that charge. This might be said to fall within that purpose, in organizing a town, which has reference to the safety of its inhabitants.

But under what corporate purpose can be classed a donation of money to a private corporation to enable it to construct dams and water races, or manufacture cloth, or build hotels?

In this connection we would call the attention of the court to the fact that the Supreme court of Massachusetts in the cases of *Fowler* v, *Selectmen*, *&c.*, 8 Allen, 80; and *Freeland* v. *Hastings*, 10 Allen, 580, decided, as the Supreme court of Illinois decided, that a tax levied for the purpose of raising bounties to exempt a municipality from

a draft during the late war was a tax for municipal purposes. But when the question subsequently arose whether a municipality in Massachusetts could levy a tax for the purpose of promoting a private enterprise, that court had no hesitation in deciding that such power did not exist. We refer to the case of *Lowell* v. *Boston*, 111 Mass., 460, from the opinion in which case we make an extract farther on in our argument.

In *Wilkesbarre City Hospital* v. *County of Luzerne*, 84 Pa. St., 55, the question was as to the constitutionality of a statute passed to provide for the support, out of the county treasury, of the sick and injured poor, when under treatment in hospitals in certain cities and boroughs, and which provided that "it shall be lawful for "the managers or trustees of any hospital for the cure of "the sick or injured, which is now or may hereafter "be established and duly incorporated in any city or "borough of this commonwealth, containing a population "of not less than twenty thousand inhabitants, to make "requisitions quarterly upon the commissioners of the "county in which such hospital may be situated, for the "support of said poor patients under treatment in such "hospital as are unable to pay for their treatment," etc. A subsequent section limited the amount to be thus drawn.

In discussing the question of what constitutes a corporate purpose, the Supreme court of Pennsylvania recognize the validity of an issue of bonds for the purpose of raising money to pay bounties for the purpose of relieving the people of the municipality from an impending draft by lot into the military service, because in such case the purpose is payment in discharge of a duty or obligation *lying upon the municipality*, and not a loan or

advance for purposes private in their nature, or made in aid of private corporations or parties. But on coming to the question then at bar, the court say:

"A law enabling a private incorporated hospital to "make requisitions upon a county, for the payment of its "charges for the support of patients under treatment, "*even though they be paupers*, is an appropriation of "money by the county to the corporation, and comes "within the prohibition of the constitution. It is not a pay- "ment of any debt incurred by the county, but is a "transfer of the money by operation of the act of as- "sembly from the treasury of the county to that of the "hospital. *The hospital exercises no municipal function*, "but takes as a private institution by a mere act of ap- "propriation. It is under no obligation to open its doors "to municipal inspection or visitation, and cannot be "controlled or called to an account for the moneys drawn "upon requisition—once paid, the money is beyond the "control of the county. In *Speer* v. *School Directors*, "14 Wright, 150, care was taken to distinguish between "those necessary governmental purposes and that proper "official disbursement which are essential to the wel- "fare of society, and for which municipal liability "and credit must often be pledged, *and those pur- "poses, however public in their nature*, which are ad- "ministered by private, and, in a legal sense, irresponsi- "ble hands."

So, in the case now at bar, the Ottawa Manufacturing Co. exercises no municipal functions, and its purposes, however public in their nature, are administered by private, and not only in a legal sense, but actually, irresponsible hands.

If a municipality may not pay money to provide for

paupers, which it may be under obligation to support, still less has it the power to donate bonds to a private manufacturing corporation, although the latter might give employment to those who would otherwise be dependent upon public charity, or might add to the amount of property taxable by the municipality.

Here we may suggest what seems to us a complete refutation of the theory that the object of the donation of these bonds is a corporate purpose as much as the payment of bounties to avoid a draft, which was sustained by the Illinois, Massachusetts and Pennsylvania cases. Until the draft should be made, the burden to provide a quota of men rested upon the municipality and on its citizens equally, and the burden could more equally be borne by payment of bounties than by selecting certain individuals who should personally discharge the obligations of the municipality; but none of the cases hold that if, by virtue of a draft or otherwise, the burden was resting on a private individual to be enrolled in the military service, a municipality would have the power to tax the community for the benefit of such private person, no obligation resting on the corporation which would thereby be discharged.

In *Livingston County* v. *Neider*, 64 Ill., 432, the Supreme court said:

"It may be difficult to determine with precision what is "a 'corporate purpose' in the sense of the constitution, "but it is less difficult to decide what is not such a pur- "pose. The true doctrine is, such purposes, and such "only, as are germane to the objects of the creation of the "municipality, at least such as have a legitimate connec- "tion with those objects, and a manifest relation thereto. "A view more liberal and extended than this might in- "volve these corporations in much embarrassment, invit-

"ing them to prodigal taxation and a lavish expenditure "of its proceeds in works more fanciful than really pro- "motive of the best interests of the municipality."

The meaning of the court is not very happily expressed, but there is no doubt what it is. We must look to "the "object of the creation of the municipality."

But in view of *Johnson* v. *The County of Stark*, 24 Ill., page 75, there can be no room for doubt or cavil as to the meaning of the language used by the Supreme Court of Illinois, as to what is, and is not, a corporate purpose, so far as the case at bar is concerned, within the meaning of the fifth section of the ninth article of the Constitution of 1848, which alone could authorize the legislature to empower the city of Ottawa to issue these bonds.

At page 87 of said report, the court use the following language:

"We come now to the consideration of the fifth section of "the ninth article, upon which the weight of the argument "in this case, against the constitutionality of this act, was "based. It is this: 'The corporate authority of counties, "townships, school districts, cities, towns and villages may "be vested with power to assess and collect taxes for cor- "porate purposes, such taxes to be uniform in respect to "persons and property, within the jurisdiction of the body "composing the same. And the general assembly shall "require that all the property within the limits of muni- "cipal corporations, belonging to individuals, shall be "taxed for the payment of debts contracted under au- "thority of law.' As before observed, it is urged that "the act under consideration is supposed to be unconsti- "tutional, by defendants in error, because a tax on the "property of individuals in the county to meet this in-

In this case the court held a tax laid by the Town of Pontiac to aid in securing a State Reform School and thus secure its location at Pontiac was illegal because not laid for a corporate purpose.

"debtedness, follows its creation as a necessary conse-
"quence.

"This constitutional provision is too clear and explicit,
"in conferring upon the general assembly power to author-
"ize the county to levy and collect such a tax for corporate
"purposes, to admit of any question. It then becomes
"necessary to ascertain whether the aiding in the con-
"struction of a railroad running through its limits, is such
"a county purpose as authorizes the legislature to confer
"upon it that power.

"That the public at large, the individual shareholders
"of the company, and the citizens of the county, all have
"an interest in the construction of such a road, is too plain
"to admit of any doubt. By its completion, the public
"have increased facilities for travel and transportation, the
"shareholders the prospect of profit on their investment,
"and the citizens of the county have afforded to them in-
"creased facilities for trade and commerce, enhanced value
"to property within their local division, with the more
"speedy development of their agricultural and other re-
"sources.

"The citizens of the county, while they enjoy advantages
"common to the public at large, have other and more im-
"portant benefits resulting from its construction.

"In the completion of these improvements, the whole
"community is either immediately or remotely interested,
"those near the line on which it passes, in a larger, and
"those more remotely situated, in a less degree. But all
"participate in its benefits.

"In the affairs of life, public and private interests are so
"closely blended, that it is difficult to draw the line sepa-
"rating, in all cases, the one from the other. Numerous

" cases may be given, fully illustrating each, but the es-
" tablishment of any rule by which each may be distin-
" guished from the other, is, perhaps, impracticable.

" *All will perceive that the building of court houses, jails,*
" *poor houses, the opening and keeping in repair of com-*
" *mon highways, and the erection and maintenance of*
" *bridges by which they are rendered useful to the people,*
" *are 'county purposes,' for which the people of the county*
" *may be taxed.*

" *And that the erection of hotels, mercantile, manufactur-*
" *ing, trading and banking houses, although of great im-*
" *portance to the prosperity of the community, are not such*
" *purposes as were contemplated by the framers of the con-*
" *stitution. These are properly regarded as matters of in-*
" *dividual enterprise, and cannot, in any reasonable or just*
" *sense, be regarded as public or county purposes.*"

No language could be more emphatic.

No illustrations could be more apt. It is clear they say, that the building of court houses, jails, and the keeping of highways in repair, are corporate purposes within the meaning of the constitution, for which the people may be taxed. And equally self-evident that the building of hotels, the creating of manufacturing establishments, are not such corporate purposes as were contemplated by the framers of the constitution, and neither could the municipality levy a tax or issue bonds to aid such private enterprises, nor could the legislature empower it to do so. Such purposes are not corporate, and consequently are *ultra vires*. What is the present donation of bonds for? To a private individual, to aid a private corporation, to create a water power for its own sole use for *manufacturing* purposes. It expressly

falls within the language of the Supreme court, and was prohibited by the constitution of Illinois.

In *Ohio Valley Iron Works* v. *Moundsville*, 11 West Va., 1, the facts were that the town, having a general authority to issue bonds for corporate purposes, had passed an ordinance, which had been ratified by the vote of the citizens, donating $10,000 in bonds to the Iron Works, and the bonds had been delivered. A *mandamus nisi*, to compel the levy of a tax to pay the interest upon the bonds, was issued. The petition alleged that the works of petitioner were located by it within the corporate limits of Moundsville relying upon the inducement of the contract of the town to make such donation, and that relying upon said agreement, it had made extensive improvements, which had generally promoted the material interests of said town, and the inhabitants thereof.

The return traversed none of the facts alleged in the petition, but presented in substance only questions of law, and the main question on hearing was the legality of the issue of the bonds.

The court, in its opinion, cite only the case of *Loan Association* v. *Topeka*, 20 Wall., 655, and proceed as follows:

"*In the case before us it is conceded, and the record "shows, that the donation of the bonds to the company "was without consideration, that they were in aid of pri- "vate enterprise solely, that the town had no stock or "other interest in the company, received none of the "profits, had no control over its affairs, but had volun- "tarily made a gratuitous donation of the bonds which "were expected to be paid by taxation. I am satisfied "that such a transaction was not within the meaning of*

"*the legislative act relied on, but was contrary to the spirit* "*of the constitution, and to the fundamental principles of* "*private rights, and that said bonds are illegal, null and* "*void.*"

The relations of the donor and donee, in the foregoing case, seem to have been like those in the case at bar.

In *Bissell* v. *City of Kankakee*, 64 Ill., 251, the court said, in reference to certain bonds issued by the city of Kankakee:

"This was not a borrowing of money for municipal "purposes, or the payment of any indebtedness, but sim- "ply a donation to 'The Douglas Linen Company,' to "enable it to embark in the manufacture of linen fabrics "in that city. The legislature had never conferred upon "that city any power to make donations for such pur- "poses. It was held in *Trustees, etc.*, v. *McConnel*, 12 "Ill., 138, that a municipal corporation, being a mere "creature of the law, can only exercise such powers as "are conferred upon it by the act creating it. Mani- "festly, therefore, the acts of the officers of the city of "Kankakee, in issuing the bonds for the purpose of "making a mere donation to 'The Douglas Linen Com- "pany,' were *ultra vires*. No warrant for their action "can be found in the city charter, or in any act of the "legislature.

"This is not a case where there has been an irregular "or defective execution of a power in issuing bonds by a "corporation having lawful authority to do so, but here "there is a total want of authority, and hence the bonds "are absolutely void." Citing:

Marshall Co. v. *Cook*, 38 Ill., 44.
Schuyler Co. v. *The People*, 25 Ill., 181.
Clarke v *Supervisors, etc.*, 27 Ill., 305.

In *English* v. *The People*, 96 Ill., 569, this decision was re-affirmed.

The court said: "No attempt was made to show that "this item falls within any class for which the city might "lawfully levy taxes. On the contrary, parol evidence "was introduced by the plaintiff in error showing, with "reasonable certainty, that the objection is well taken— "that it is a tax for the payment of the principal and in- "terest of bonds issued in aid of a private manufacturing "corporation."

"In *Bissell et al.* v. *the City of Kankakee*, 64 Ill., 249, "we held that such bonds are void, even in the hands of "an innocent purchaser, and we still adhere to the doc- "trine there announced."

We have always supposed that the case at bar was completely within the principles established in *Loan Association* v. *Topeka*, 20 Wallace, 655. That case was welcomed by the profession as settling the law upon questions of this sort, on safe and stable grounds, and it would be a public calamity if its authority should be disregarded.

In that case the court said:

"To lay with one hand the power of the government "on the property of the citizen, and with the other to "bestow it upon favored individuals to aid private enter- "prises and build up private fortunes, is none the less a "robbery because it is done under the forms of law, and "is called taxation. This is not legislation. It is a decree "under legislative forms.

* * * * * * * *

"We have established, we think, beyond cavil, that

"there can be no lawful tax which is not laid for *a public* "*purpose.*

"It may not be easy to draw the line in all cases, so as "to decide what is a public purpose in this sense, and "what is not.

"It is undoubtedly the duty of the legislature which im- "poses, or authorizes municipalities to impose a tax, to see "that it is not to be used for purposes of private interest "instead of a public use, and the courts can only be justi- "fied in interposing when a violation of this principle is "clear, and the reason for interference cogent; and in de- "ciding whether, in the given case, the object for which "the taxes are assessed falls upon the one side or the other "of this line, they must be governed mainly by the "course and usage of the government, the objects for "which taxes have been customarily and by long course "of legislation levied, and what objects or purposes have "been considered necessary to the support and for the "proper use of the government, whether state or munici- "pal. Whatever law fully pertains to this, and is sanctioned "by time and the acquiescence of the people, may well "be held to belong to public use, and proper for the "maintenance of good government, though this may not "be the only criterion of rightful taxation.

"*But in this case before us, in which the towns are au-* "*thorized to contribute aid by way of taxation to any class* "*of manufactures, there is no difficulty in holding that* "*this is not such a public purpose as we have been con-* "*sidering. If it be said that a benefit results to the lo-* "*cal public of a town by establishing manufactures, the* "*same may be said of any other business or pursuit which* "*employs capital or labor. The merchant, the mechanic,* "*the innkeeper, the banker, the builder, the steamboat*

"owner, are equally promoters of the public good, and "equally deserving the aid of the citizens by forced con- "tributions. No line can be drawn in favor of the man- "ufacturer which would not open the coffers of the public "treasury to the importunities of two-thirds of the busi- "ness men of the city or town."

In view of the foregoing authorities, it is difficult to see how the bonds in question can be considered as having been issued for a corporate purpose. They were presented to a private corporation as an absolute gift, so far as receiving any property in exchange was concerned. They were given to help the company create a water power which it was to farm out for its own profit, and in which the city was to have no interest. Was this one of the objects in view in creating this municipal corporation? Was it even germane to its objects? If the exercise of this power is permissible, where is the line to be drawn? What species of business enterprise is there in which cities may not embark?

We add a quotation from a very able opinion of the Supreme Court of Massachusetts, in *Lowell* v. *Boston*, 111 Mass., 460. The court said:

"The power to levy taxes is founded on the right, duty "and responsibility to maintain and administer all the gov- "ernmental functions of the state, and to provide for the "public welfare. To justify any exercise of the power re- "quires that the expenditure which it is intended to meet "shall be for some public service, or some object which con- "cerns the public welfare. The promotion of the interests "of individuals, either in respect of property or business, "although it may result incidentally in the advancement of "the public welfare, is, in its essential character, a private "and not a public object. However certain and great the

"resulting good to the general public, it does not, by reason "of its comparative importance, cease to be incidental. "The incidental advantage to the public, or to the state, "which results from the promotion of private interests, "and the prosperity of private enterprises or business, "does not justify their aid by the use of public money "raised by taxation, or for which taxation may become "necessary.

"It is the essential character of the direct object of the "expenditure which must determine its validity, as justi- "fying a tax, and not the magnitude of the interests to be "affected, nor the decree to which the general advantage "of the community, and thus the public welfare, may be "ultimately benefited by their promotion."

In *People* v. *Batcheller*, 53 N. Y., 143, GROVER (Justice) delivering the opinion of the court, said:

"I think it would not be claimed that a town could "be compelled to become a stockholder in a banking or "manufacturing corporation, although it appeared that "the particular corporation would largely promote the "public interest where the business was conducted."

Since writing the above, the published opinions of this court in two cases decided at the present term have come to our knowledge, and we submit they are entirely conclusive of this suit.

The first is the case of *Osborn* v. *The County of Adams, in the State of Nebraska;* the second is *The City of Parkersburgh* v. *Brown et al.*

The first case, as the court will remember, relates to the construction of a statute of Nebraska. It would seem that the constitution of that State imposed no limitation upon the power of the legislature in authorizing taxa-

tion by municipal corporations, and the legislature had passed an act authorizing counties and cities to issue bonds to aid in the construction of any railway or other work of internal improvement.

The question presented was whether this statute authorized a municipal corporation to issue bonds for the purpose of aiding in the erection of a grist mill, and the court, in the conclusion of its opinion, says:

"For these reasons we adjudge that the bonds issued "by the county commissioners in behalf of Juniata, in "Adams county, Nebraska, in aid of the construction of "the steam grist mill in that precinct, are not authorized "by the statute of February 15, 1869, and as authority for "their isssue is not claimed to exist under any other "statute they must be held to be without binding force "against the precinct."

This is a decision to the effect that bonds issued by a municipality for the purpose of aiding in the construction of a grist mill are not issued for a corporate purpose, and require express legislative authority in order to sustain them, and, as we have already shown, in the State of Illinois, the legislature is forbidden by the constitution to give such authority.

In the other case of *Parkersburgh* v. *Brown*, this court speaks as follows:

"But we are of opinion that within the principles de- "cided by this court in the case of *Loan Association* v. "*Topeka*, 20 Wall., 655, the bonds in question here are "void. The act of 1868 authorizes the bonds to be "issued as the bonds of the city. The principal and in- "terest are to be paid by the city. The bonds are to be "lent to persons engaged in manufacturing. Those

"persons are to pay the interest on the loans semi-annu-
"ally, to the treasurer of the city, and are also to pay an-
"nually to the city five per cent. of the principal to go
"into the sinking fund of the city till the 'loans' are paid
"in full."

* * * * * *

"Taxation to pay the bonds in question is not taxation
"for a public object. It is taxation which takes the
"private property of one person for the private use of
"another person. There is in the act of 1860 a provision
"that the tax shall not exceed a given percentage of the
"assessed value of the property, or so much on every
"tithable, but it does not appear that a tax for these
"bonds would exceed the limit. Therefore, the inference
"that it was intended, by the act of 1868, that such tax-
"ation as should be necessary to pay the bonds should be
"resorted to, must remain in full effect. *There was no*
"*provision in the constitution of West Virginia of 1862*
"*authorizing the levying of taxes to be used to aid private*
"*persons in conducting a private manufacturing business.*
"*This being so, the legislature had no power to enact the*
"*act of 1868.*

"There having been a total want of power to issue the
"bonds originally, under any circumstances, and not a
"mere failure to comply with prescribed requirements or
"conditions, the case is not one for applying to the city
"under any state of facts, any doctrine of estoppel or
"ratification by reason of its having paid some instal-
"ments of interest on the bonds (*Loan Association* v. *To-*
"*peka*), or by reason of any of the acts of its officers or
"agents in dealing with the property covered by the deed
"of trust."

According to the authority of this case, as we under-

stand it, the absence in the constitution of an inhibition upon the donation is not sufficient to render the bonds valid, even when issued under express legislative authority; and such donation must be held void, unless the plaintiff, holding the bonds with notice of their having been donated, can point out in the constitution an affirmative provision authorizing the legislature to empower a municipal corporation to make such donation. The constitution of Illinois, so far from containing a provision authorizing such taxation, absolutely prohibits the legislature from granting the power.

We respectfully submit to the court that these two cases decided at the present term must be conclusive of the case at bar.

The defense in the present case is even much stronger than in either of the foregoing cases, for, in the present case, the bonds have not gone into the hands of an innocent purchaser, but only to one having full notice of everything connected with their issue, and the bonds were a *donation* on the part of the city, while in the Parkersburgh case, at least, the manufacturer who received the bonds was to refund to the city all the moneys that it might loan, and give security for that purpose.

That, in short, was a loan by the city to the manufacturing company, and although illegal it was still not quite so unblushing, and we may say impudent a perversion of municipal authority as the attempt made in this case to make an absolute present of $60,000 to a private manufacturing company for its own benefit and behoof.

II.

IF THE PURPOSE FOR WHICH THESE BONDS WERE ISSUED CAN BE CONSIDERED A CORPORATE PURPOSE, AND THE ACT OF THE LEGISLATURE VALID, THE BONDS, IN ORDER TO BE VALID, SHOULD HAVE BEEN ISSUED BY AUTHORITY OF THE BOARD OF COMMISSIONERS SPECIALLY APPOINTED RY THE LEGISLATURE TO TAKE CHARGE OF THIS WHOLE MATTER, TO SUBSCRIBE THE STOCK AND TO ISSUE AND SELL AT PAR THE BONDS OF THE CITY TO RAISE THE MONEY FOR ITS PAYMENT.

We consider each of our five propositions decisive of this case, but the one just stated seems to us too clear to admit of doubt. We have denied, under our last head, the power of the legislature to authorize the City of Ottawa to issue these bonds, because, we claim, they were issued for a purpose not corporate, and this the legislature of Illinois has no power to authorize. But, if the purpose had been corporate, and the legislature had had the constitutional power to authorize their issue, the mode and conditions prescribed by it must be followed.

What were they?

On the 15th of February, 1851, as set forth in our preliminary statement, the legislature passed an act incorporating William H. W. Cushman and certain other persons mentioned in the act, into a company, under the name of the "Ottawa Manufacturing Company," for the purpose of building a dam across Fox river, and doing such other work as might be necessary to create a water power at Ottawa.

On the 16th day of February, 1865, the legislature

passed another act, amending the first, and authorizing the company created by the first act to build a dam across the Illinois river, as well as the Fox, for the purposes specified in the first act.

On the 11th of February, 1867, the legislature passed another act, entitled: "An act to authorize the City of "Ottawa to subscribe to the stock of the Ottawa Manu- "facturing Company."

This act was, of course, an amendment of the city charter. It would not be pretended that the city could subscribe for this stock without the special authority of the legislature. It would be absurd to say it could subscribe under its general powers. But even if it could have done so, the legislature having acted upon and taken jurisdiction of the subject, and prescribed the manner and conditions of subscribing to the stock, and of issuing the bonds therefor, it cannot be claimed that the city could proceed, except in conformity to the statute.

Neither can any one have the hardihood to claim, that because the legislature had given the power to subscribe to the stock of the Ottawa Manufacturing Company, and issue its bonds to raise the money for payment, it could issue them without reference to the conditions of this act, and make a donation of them to this same company.

The legislature had spoken, and had prescribed how the city might aid in promoting the objects of the company. *It might sell its bonds at par to the amount of $100,000, and invest the money in the company's stock. This certainly did not give it power to issue its bonds, and* DONATE *them to the company, without receiving stock in exchange.*

The act in question created five persons named therein

a board of commissioners, who were to appoint a president, secretary and treasurer. In case of a vacancy in their body, the circuit court was to fill it. The board was authorized to subscribe $100,000, to the stock of the Ottawa Manufacturing Company, and when fully paid for, to receive and hold it on behalf of the city. In order to raise the money to pay for the stock, the board was "authorized for and on behalf of said city, to make, exe-"cute and dispose of bonds of the same to the amount of "one hundred thousand dollars, payable in not less than "ten years," and the act further provided that "such "bonds shall not be disposed of by said commissioners "for less than their par value."

These were the modes and conditions upon which the city of Ottawa could issue its bonds for the purpose of creating a water power.

Now, what did the city in fact do? The finding of the court shows.

On the 11th of May, 1869, the city council adopted a resolution requesting the board of commissioners, which had been duly organized, to subscribe for the stock. This the board did not do, for what reasons does not affirmatively appear, but it must be presumed that the board, in which alone the power and discretion of deciding upon the issue were lodged, exercised the same adversely to the issue of the bonds. The commissioners declining to subscribe to the stock or issue the bonds, the mayor and clerk, on the 2d of August following, issued the bonds without receiving any stock in exchange, and the court finds the bonds were never placed in the hands of the commissioners, but were delivered to Cushman for the company, and the commissioners never consented to their issue, nor in any manner had any connection therewith.

The bonds were therefore issued by a branch of the city government, having no authority to issue them, without the consent of that part of the city authorities which alone had the power to issue them, and without obtaining the consideration which was to be the condition of their issue, and without even the colorable sanction of a void legislative act for the donation. It was an extraordinary assumption of power on the part of the city council—the directing by ordinance, the mayor and clerk to issue these bonds to Cushman to be used in creating a water-power "under the franchises and powers which have been "granted for that purpose by the legislature," when it was known to all of them that the entire authority in that matter had been entrusted by the legislature to a board of commissioners, and the council had actually appointed a committee to request that board to act.

In this case there was actual notice. The bonds were handed over by the city to Cushman, one of the directors of the manufacturing company, and sold by the company to Eames, a citizen of Ottawa, who bought, as the court finds, with knowledge of all the facts, and by Eames sold to the present plaintiff after maturity, and with knowledge on his part, also, of all the facts.

Every one of the parties who had dealt in the bonds involved in this suit knew that the board of commissioners was vested with exclusive power over the issue of the bonds, that they had declined to issue them, and that the bonds were, in fact, issued by a portion of the city government that had no more power to issue them than had the city constable.

The power to issue those bonds was given to the board of commissioners, and given to them only for the purpose of raising money to pay for stock.

The bonds were, in fact, issued by the mayor and clerk on the authority of the common council, without the consent of the commissioners, and not issued to raise money for the payment of the stock.

In *Middleport* v. *Ætna Life Insurance Company*, 82 Ill. 565, the court said:

"Where one mode of payment of municipal indebted-
"ness is fixed by statute, by implication it excludes all
"others. The electors gave their consent to the statu-
"tory mode of paying the appropriation voted, viz: by
"taxation, and none other, and the corporate authorities
"of the town were not at liberty to adopt any other
"mode."

In *Superivisors* v. *People ex rel.* R. I. & A. R. R., Co., 25, Ill., 181, the facts were as follows: a general law of Illinois passed in 1849, placed the control of such county matters as the issuing of bonds in the county court; in 1850 the county of Schuyler adopted the township organization law, which law was in 1851 amended by transferring the control of county affairs, in counties under township organization, from the county court to the board of supervisors. The effect of this act was to authorize boards of supervisors to call elections, and issue bonds in cases where the power had theretofore been lodged in the county court.

Prettyman v. *Supervisors*, 19 Ill., 406.

In 1855 an act passed the legislature of Illinois authorizing the county to subscribe for stock of the relator and issue bonds therefor, the language of the act providing the mode being as follows: "And each of said counties
"are hereby authorized in the premises to, by their
"county court, as fully act as individuals might or could

"do; each of said counties shall, and it is hereby made "the duty of the county court of each of said counties, "to order an election to be held," &c. * * * "If a "majority of votes cast are in favor of stock as aforesaid, "it shall be the duty of the county court to subscribe for "stock," etc.

The pivotal question in the case was whether the board of supervisors, under an election called by them, at which there was a majority in favor of the subscription, had power to issue the bonds, and the Supreme court of Illinois refused a mandamus to compel the issue by the board of supervisors of bonds to the amount of $16,000, although the board had prior thereto issued bonds to the amount of $69,000, the total subscription having been $75,000.

And in the case of *Schuyler Co.* v. *Farwell*, 25 Ill., 181, heard with the foregoing, and which was a suit on coupons of some of the bonds already issued, it was decided that the bonds were void, even in the hands of third parties.

The language of the court is as follows:

"Now, all the acts required by both these laws to be "done by the county court were performed by the board "of supervisors, and the county court has taken no part "in them, and the important question arises, are they bind- "ing upon the county? We see no way of avoiding the "conclusion that they are not.

"In the case of *Prettyman* v. *Supervisors of Tazewell* "*County*, 19 Ill., 406, a law passed in 1849, authorized "the county court to do similar acts, and we held that "the township organization law, subsequently passed, "transferred the power from the county court to the "board of supervisors, and that consequently the county

"was bound by the acts thus performed by the board of "supervisors. But here, the legislature knowing, as we "are bound to presume, that the county had adopted "township organization, and that there was a board of "supervisors in the county, which, by the general law, "was vested with general jurisdiction over all county "matters, and particularly all financial matters, saw "proper, for some reason which we are unable to divine, "to confer this power upon the county court, instead, as "we should suppose, of the more appropriate tribunal, "the board of supervisors. There has been no subse- "quent law giving the least color to say that the power "has been transferred from the county court, where it "was expressly vested, to the board of supervisors. "These bonds were, then, executed by the chairman of "the board of supervisors, without the least shadow of "authority. As well might the sheriff of the county, or "the circuit court, have undertaken to perform these "acts, and execute these bonds, as this board of super- "visors. There was a total want of authority, and the "acts were consequently void. Nor can we compel "the defendants to go on and do further void acts by "issuing more bonds, or paying interest on those already "issued."

We also quote from *Gaddis* v. *Richland County*, 92 Ill., 123, as follows:

"The elections having been called and held under the "direction of the board of supervisors, and not by the "county court, an act of the general assembly was adopted "on the 9th of April, 1869, to cure irregularities in these "elections and to render valid the steps taken to make "the subscription and to issue the bonds.

"Section 3 of that act (Priv. Laws, Vol. 3, p. 360), pro-
"vides, 'that all elections held for the purpose of voting
"said stock, and the manner in which stock was voted, are
"hereby legalized in all respects, and said stock to be sub-
"scribed in the manner the same was voted.' This is the
"provision which is claimed to be repugnant to the con-
"stitution.

"All will concede that a municipality can only exercise
"the powers conferred by the charter of their organization,
"and such powers must be by express grant, or such as
"follow by reasonable implication as necessary to perform
"duties imposed or privileges conferred, and the means of
"their accomplishment are not specified. *This being a*
"*fundamental rule, it follows that the power to create a*
"*debt by a county, or to subscribe to stock in a railroad,*
"*or to issue bonds to raise money to aid in its construction,*
"*must be conferred by grant from the law-making power,*
"*and when the grant is made and the power is conferred,*
"*it must be substantially pursued. If a particular mode is*
"*prescribed, the municipality cannot adopt a different mode,*
"*and if the power is conferred on one set of officials or*
"*individuals, it cannot act through or by a different set of*
"*officials or persons.* The municipality have no discretion
"in executing the power, nor can they adopt a mode they
"deem better adapted to accomplish the end. The general
"assembly had the power to confer the authority or to
"withhold it, or, in conferring it, to impose such terms and
"conditions as they chose. It was an exercise of power
"by them in the government of the state, and that body
"were the sole judges as to the manner in which the
"power should be exercised, and the functionaries or in-
"dividuals who should exercise it.

"In this case the general assembly conferred the power

"on the county court, and we must presume when the "power was granted the general assembly knew that this "county was under township organization, and had a board "of supervisors as well as a county court, and knowing that "fact, we must conclude that body, for reasons satisfactory "to themselves, intended to confer the power on the county "court, and not on the board of supervisors. But if not "apprised of the fact we cannot say that, had it been "known, the enactment would have been different. The "expression of one thing or one mode of action in an en- "actment is usually held to be an exclusion of all other "things or modes. The language is plain and unambig- "uous when it says the county court may call an election, "subscribe for stock of the road, and issue bonds as di- "rected. The language neither requires nor admits of "interpretation. No one can be in any, the least doubt "of its meaning.

"The power, then, having been conferred on the county "court, it could alone act in carrying out the power. No "other functionary, body or individual, could act simply "for the want of power. See *Schuyler County* v. *The* "*People*, 25 Ill., 181; *Marshall County* v. *Cook*, 38 id., "45; *Clarke* v. *Board of Supervisors*, 27 id., 305; *Force* "v. *Town of Batavia*, 61 id., 99, and *Harding* v. *Rock-* "*ford, Rock Island and St. Louis Railroad Co.*, 65 id., "90. The first of these cases is in point, as the material "facts of the two cases are similar and not distinguish- "able.

"In the case of *Marshall County* v. *Cook*, *supra*, the "county court acted in ordering the election when the "power was vested in the board of supervisors. There, "after an election had been held, the board then acted, "and the bonds were issued under and in pursuance of

"an order of the board, and it was held that the county "court had no power to call the election, and the bonds "thus issued were void. From the rule announced in "these cases the bonds were issued without authority, "and hence were void.

"It is, however, urged that there was in this case not a "want of power, but a defective execution of the power "by the board. That body acted without power—they "had no power to execute. Had the county court, which "possessed the power, acted, and omitted to perform some "specified act or duty, then there would have been power "under which the county court was acting, but by reason "of the omission it would be defectively executed. But "here the board of supervisors had no power to execute, "defectively or otherwise.

* * * * * * * *

"It is, however, urged that the bonds were negotiated "before due, to innocent persons, without notice, and they "should be protected. As a general rule, no person can "acquire rights under a void instrument. Such is the case "with forged paper and paper issued without authority.

"Then, as these bonds were issued without authority, "and void, the purchaser acquired no rights under them.

"Again, the bonds on their face referred to the charter, "the amendment thereto, and the curative act, by their "dates. Had the purchaser turned to the acts he would "have found that the county court alone had power to act "under the law, and the bonds offered to him were issued "without authority.

* * * * * * * *

"The bond itself referred him to the source of power, "and he only had to turn to the law to see that the board

"of supervisors had no power to act in the premises. The "bond being unauthorized and void, the county is not "liable unless rendered so by the act of April 9, 1869, "which purports, as we have seen, to render those void "elections valid."

The proper test of the validity of these bonds in the hands of a purchaser with knowledge of all the facts, which is the case here, is to inquire whether or not *mandamus* would lie to compel their issue to Cushman by virtue of the proceedings had by the city council, and for the purpose, and in the manner, for and in which they were issued.

We do not think it needs further argument to convince your Honors that no court would issue a peremptory writ to that effect.

We respectfully submit to your Honors that on the foregoing considerations and authorities, the statement that these bonds are void in the hands of Carey, who occupies the position of a holder with *actual* notice of all the facts, seems as plain as any legal proposition can be which has not yet been decided.

We have now, for the first time since this case was submitted, had an opportunity of commenting upon the argument for the defendant, filed in this case in January, 1882. In that argument, ws find on page 10 the following:

"It is apparent that the legislature regarded this manu- "facturing company and its proposed development of the "water power of the Ottawa and Fox rivers, as matters "of public interest; but the act authorizing the commis- "sioners to issue bonds, and thus impose a debt upon the "city, and subject it to the liability of stockholders, was

city charter, is certainly conclusive of this case, in view of the decisions of the Supreme court of Illinois.

In the case already quoted of *Bissell* v. *City of Kankakee*, 64 Ill., 251, the court said: "This was not a borrowing of money for municipal purposes, or the payment of any indebtedness, but simply a donation to the Douglass Linen Company to enable it to embark in the manufacture of linen fabric in that city. The legislature has never conferred upon that city any power to make donations for such purposes. Manifestly, therefore, the acts of the officers of the city of Kankakee in issuing the bonds for the purpose of making a mere donation to the Douglass Linen Company, were *ultra vires*. and no warrant for their action can be found in the *city charter*, or in any act of the legislature."

Here special reference, the court will observe, is made to the city charter of Kankakee. It is to be found in Vol. 1 of the private laws of 1865, p. 393, and it gives the city "power to borrow money on the credit of the city and pledge the revenue of the city for its payment, and issue bonds therefor." This is the same power given by its charter to the city of Ottawa, in almost the identical words.

The court there held that such a clause in the charter upon which alone counsel in the present case place their reliance, did not authorize the issuing of bonds in aid of a private enterprise; and that would unquestionably be the decision of the Supreme court of Illinois in the case at bar.

Even in regard to the construction of railways, while the Supreme court of Illinois has held, in various cases, that railways may be so far regarded as in the nature of improved highways that the legislature may authorize a town or city to vote for a subscription to their stock, or a

donation, yet it has never been held that a town or city could subscribe to such stock under any general grant of power given in their charter in general terms authorizing the creation of a debt or the issue of bonds. On the contrary it has always been the well understood law of Illinois that municipal subscriptions of this character require a special grant of power from the legislature in order to be valid.

In the case of *Middleport* v. *The Ætna Life Insurance Co.*, 82 Ill., 567, the court uses this language:

"Constructing railroads, or aiding such construction by "donations, are not among the general powers of municipal corporations, and it has never been understood the "general assembly had any power to impose such burdens, or authorize others to do so, upon the citizens of "any municipality, without their consent."

Again, in *Pitzman* v. *Village of Freeburg*, 92 Ill., 112, the court says:

"Bearing in mind that there is no implied authority in "municipal corporations to incur debts or borrow money "in order to become purchasers or subscribers for shares "of capital stock of railway corporations, *and that such "authority must be conferred by express grant*, and cannot "be assumed from implication or inuendo merely, it would "seem evident there was here no power conferred upon "appellee to make subscription for shares in the capital "stock of the Belleville & Southern Illinois Railroad Company."

In that case the charter of the railway company authorized the railway company "to take and receive subscrip-"tions to their capital stock on such terms and in such "amounts as they may deem for the interest of said com-

"pany, and as they may prescribe by their by-laws and "regulations, from any other railroad company or cor- "poration, and from any county, city, town or village, and "any such subscription shall be valid and binding upon "any railroad company, corporation, county, city, town or "village making the same."

Yet the court held, that although that clause empowered the railroad company to *receive* such subscriptions, it did not authorize towns and villages to make them. The language of the court is:

"True, it contemplates subscriptions will be made by "counties, cities, towns and villages, but it does not say "cities, towns and villages are thereby *empowered* to make "such subscriptions."

In the case of *Welch* v. *Post*, 99 Ill., 475, the court uses the following language:

"Without passing on this question definitely, there is "another view of the case that is equally conclusive, upon "which the decision may be placed. Making donations "to railway corporations, and issuing interest bearing "bonds in payment thereof, are not among the usual nor "implied powers possessed by municipal corporations. "Unless, therefore, express power was given by statute "to the town of Enfield to issue bonds involved in this "litigation, it will be conceded such bonds are void, in "whomsoever hands they may be found."

And again in the same case:

"Keeping in mind, as must be done, that there is no "implied authority in municipal corporations to make "donations to railway companies, and to issue interest "bearing bonds in payment, it must appear there is "*express enabling legislation* to that effect before municipal

"corporations can properly assume to exercise such extra-
"ordinary powers."

In view of these decisions, which are perfectly in harmony with the decisions of this court, we are unable to perceive how it can be seriously claimed that under a general power in the charter of a city to borrow money and issue bonds therefor, it can issue bonds as a donation to a private enterprise. The only power granted is a power to borrow money for "corporate purposes."

In the petition for a re-hearing which has now for the first time come within our knowledge, we find the case of *Wilson* v. *The Manufacturing Company*, cited by counsel for defendants in error as authority.

The case is reported under the title of *Hickling* v. *Wilson*, at page 54 of the advance sheets of 104 Illinois, and before the time limited for the argument of this case expires, we will endeavor to procure a copy of these sheets, and send them to the clerk for examination by the court.

The claim that there is anything in the case of *Hickling* v. *Wilson* which will support the position of the defendant in error in the present case is simply laughable. That case was a bill in chancery filed by several judgment creditors of the Ottawa Manufacturing Company against its individual stockholders, for the purpose of compelling them to pay up their stock for the benefit of the complainant creditors. The city of Ottawa was in no way a party to the suit, and the question as to the validity of its bonds was not in the remotest manner before the court, or considered by the court. The question did not arise in that case, and could not have arisen in it. The question had nothing whatever to do with the case. In the statement of facts prefixed to the opinion of the court,

and in giving the history of the transaction, and the proceedings of the Ottawa Manufacturing Company during its existence, it is said, among other things, that "the city "council of the city of Ottawa, having the requisite power "for that purpose, on or about the 16th of June, 1869, "issued in the name of the city $60,000.00 in bonds, "which were delivered to the said William H. W. Cush-"man." Counsel fasten upon the phrase "having the "requisite power for that purpose," and undertake to parade it here as a decision by the Supreme court of Illinois in favor of the validity of these bonds. We can only express our surprise that counsel should claim that the question of the validity of these bonds was in any manner whatever, or in the remotest degree, involved in the litigation in that case, or that any opinion upon it was expressed. As we have said, the single object of the bill was to make the stockholders of the Ottawa Manufacturing Company liable individually to the creditors of the company, to the extent of their unpaid stock; and the court, in its opinion, shows that the company had received $60,000 of the bonds of the city. Whether such bonds were void or valid was wholly immaterial for the purpose of that case, and the question was never raised. The language of the court quoted by counsel was purely accidental, and was not designed by the court as the expression of any opinion whatever upon the validity of the bonds. Indeed, in the reported case, as we find it in the advance sheets of Vol. 104, this is not the language of the court at all, but the language of the reporter in the preliminary statement of the facts of the case.

III.

EVEN IF THE BONDS HAD BEEN ISSUED FOR A CORPORATE PURPOSE, AND IF THEY HAD BEEN ISSUED BY THE PROPER AUTHORITIES, VIZ: THE BOARD OF COMMISSIONERS, THEY WOULD STILL BE UNCOLLECTIBLE BY THE PRESENT PLAINTIFF, BECAUSE THEY WERE ISSUED AS A *DONATION* TO A PRIVATE MANUFACTURING COMPANY, WHEREAS THE COMMISSIONERS WERE AUTHORIZED TO ISSUE THEM *ONLY IN PAYMENT OF A CORRESPONDING AMOUNT OF THE STOCK OF SAID COMPANY.*

Much of what has been said under the last proposition will apply as well to the present, but we wish this to stand as an independent proposition.

This would seem to be a proposition concerning which there can be no possible doubt. If A authorize B to take $60,000 in the stock of a private organization organized to carry on a private enterprise for gain, and B, instead of subscribing for the stock, makes a donation for A of $60,000 to such corporate company, no controversy could take place as to whether he was acting within his authority. It would be about as palpable a breach of authority as any case that could be imagined, and yet, in order to sustain the validity of these bonds it must be claimed, and is claimed, that if the legislature had the power to authorize the city of Ottawa to issue its bonds for stock in the Ottawa Manufacturing Company, and if it gave authority to the city to invest in the stock of such company, then the city had the right not only to invest in the stock, but to make a donation of $60,000 to the company. This pretense seems so utterly preposterous, as not to deserve serious argument. There can be no question as to the

meaning of the legislature. The first section of the act under which these bonds were issued reads as follows:

"Be it enacted, &c., that William Reddick, Milton H. "Swift, Jeremiah Wood, George Avery and Richard "Thorne be and they hereby are constituted a board of "commissioners for and on behalf of said city, to subscribe "to the stock of the Ottawa Manufacturing Company the "sum of $100,000, and when fully paid to receive and "hold the stock of said company for the same, and the "proceeds thereof for and on behalf of said city."

The fifth section provides: "The city commissioners "may, at any time, dispose of said stock at not less than "its par value."

Argument cannot add to the plainness of the proposition that the legislature only attempted to give the city power to *subscribe for stock*, and did not give the power of *donating* its bonds.

IV.

We now come to our fourth proposition, as follows:

EVEN IF THE BONDS CAN BE CONSIDERED AS HAVING BEEN ISSUED FOR A CORPORATE PURPOSE, AND IF THEY HAD BEEN ISSUED BY THE PROPER AUTHORITIES, THEY WOULD STILL BE UNCOLLECTIBLE BY THE PRESENT PLAINTIFF, BECAUSE HE BOUGHT WITH NOTICE THAT THEY WERE ISSUED TO CUSHMAN IN CONSIDERATION OF HIS CONTRACT TO BUILD "A GOOD AND SUBSTANTIAL DAM ACROSS THE ILLINOIS RIVER "AND THE FOX RIVER, SUFFICIENT TO BRING INTO USE "ALL THE AVAILABLE WATER," AND TO PROTECT THE CITY ON THESE BONDS IN CASE HE DID NOT CREATE THE WATER POWER, WHICH CONTRACT HE WHOLLY FAILED TO PERFORM.

It was upon the above proposition that the court announced its decision of this case early in the present term. That opinion has been recalled and a new argument ordered; nevertheless the opinion was in exact conformity with the statute of the State of Illinois.

The 11th section of chapter 98 of the statutes of Illinois, entitled "Negotiable Instruments," reads as follows:

"If any such note, bond, bill, or other instrument in "writing shall be endorsed after the same becomes due, "and any indorsee shall institute an action thereon against "the maker of the same, the defendant being maker shall "be allowed to set up the same defense as he might have "done had the action been instituted in the name and for "the use of the person to whom such instrument was "originally made payable, or any intermediate holder."

It cannot be denied that if the present action had been instituted by Cushman, the payee of the bond, in his own name, the defence of a failure of consideration could have been properly and successfully made. That, we understand, is substantially admitted by counsel on the other side, but they insist that a defence which would have been good against the payee is not available against an assignee, although the assignee became such after the maturity of the instrument.

Now, whatever may be the general rule of the law merchant in this particular, the State of Illinois has a right to change such rule, and the statutes of the State would be respected by the federal court, certainly in regard to bonds made by a municipal corporation of the State, and deriving its authority to issue the bond, if it had any authority, solely from the State.

We are aware it is the general rule of the law mer-

chant that the assignee of a note, even after maturity, can protect himself under the equities of his assignor, if the latter has taken the note before due for a valuable consideration, and without notice of a defense; but it cannot be denied that it was in the power of the legislature of Illinois to change this rule of the law merchant, and provide, as it has done in so many words, that if any bond or other instrument in writing is endorsed after the same becomes due, and suit is brought upon it by the endorsee, the maker shall be allowed to set up the same defense that he might have done had the action been instituted in the name, and for the use of the person to whom such instrument was originally made payable.

Whether this be a reasonable or unreasonable rule, or modification of the law merchant, is not for the courts to inquire. It is sufficient to say that it is the statutory law of Illinois.

In the case of *Root* v. *Irwin*, 18 Ills., 148, Judge CATON, one of the learned counsel on the other side, delivered the opinion of the court, and after quoting the section of the statute, which we have just quoted, the learned judge proceeded as follows:

"Surely, there is no mistaking the meaning of this "statute. It is as plain as language can make it that "when the action is brought by the endorsee of a dis- "honored note, the maker may set up the same defense "that he could have done had the action been brought by "the payee. We have only then to inquire whether this "would be a good plea, were the action brought in the "name of the payee."

And then the opinion proceeds to show that the defense set up in that suit would not have been good even if the action had been brought by the payee of the note himself.

But the court say there is no mistaking the meaning of the statute. We presume that this statute did not fall under the attention of this court when granting the rehearing, as no allusion was made to it in either of the petitions filed at that time. But it must, we think, be admitted that, in view of the existing statute, there was really no reason for the withdrawal by the court of the opinion filed in this case in October.

V.

THE STATUTE AUTHORIZED THE COMMISSIONERS TO SUBSCRIBE TO THE STOCK OF THE MANUFACTURING COMPANY, AND REQUIRED THEM TO "RAISE THE MONEY" FOR PAYMENT OF THE SUBSCRIPTION BY ISSUING AND SELLING BONDS AT NOT LESS THAN PAR. THE MAYOR ISSUED THE BONDS DIRECTLY TO CUSAMAN FOR DELIVERY TO THE MANUFACTURING COMPANY. EVEN IF THE BONDS WERE OTHERWISE FREE FROM EXCEPTION, THIS DISPOSITION OF THEM WAS ILLEGAL, AND AVOIDS THEM IN THE HANDS OF A PURCHASER WITH NOTICE.

This precise question was before this court in *Scipio* v. *Wright*, 101 U. S., 665. There, as here, the statute authorized the town to subscribe to the capital stock of a railroad company, and issue bonds for the purpose of borrowing money to pay for the stock. The town authorities did precisely what was done in this case, except that here the town got no stock. They issued the bonds, and instead of selling them for money, they turned them over to the company in exchange for stock. In our

case the city turned over the bonds to the company without even receiving stock in exchange.

But suppose they had received the stock. The transaction would still have been invalid under the authority of the case cited, because the city made a use of the bonds not authorized by the statute. Here is what this court said:

"The statute prescribed the manner in which the power "it conferred should be exercised. The town was at "liberty to subscribe for stock, but if bonds were used to "pay for it, the mode of use was directed to be borrow- "ing money with them and paying the money to the rail- "road company. It is quite conceivable that the purpose "of such a direction, instead of allowing an exchange of "the bonds for the stock taken, was that the railroad "company might obtain an amount of money equal to "the amount of the bonds. This was important to the "company, to the town as a stockholder, and to the public "as interested in the projected railway. If the bonds "might be delivered directly to the company in payment "of the stock, it might sell them at a discount. Thus it "it would fail to obtain the assistance in building its road, "which the legislature contemplated it should have. Its "stock would be practically sold for less than par, and it "would not be worth as much to the town as it would be "had all the money for which the bonds were given come "in to the company's treasury. Whether such were the "motives that induced the peculiar phraseology of the "statute or not, the highest court of New York has "repeatedly construed it as prescribing the manner in "which the bonds might be used or issued, and as denying "the power to exchange them directly with the railroad "company for the stock taken by the town.

"These decisions have been constructions of the identi-
"cal statute we have now under consideration, and by
"which the bonds now in suit are alleged to have been is-
"sued. The construction given by the state court must,
"therefore, be our guide.

"*Starin* v. *The Town of Genoa*, 23 N. Y., 439, was a
"suit for interest upon the town bonds made under the
"act. They had been exchanged with a railroad company
"for capital stock taken for the town, and the exchange
"was accompanied by the same agreement as that made
"between the town and company in the present case. The
"plaintiff was a purchaser from the railroad company,
"with knowledge that it had received the bonds in pay-
"ment of stock. In these respects the case was exactly
"like the present. The court of appeals ruled that issu-
"ing the bonds by exchanging them for the company's
"stock was not an execution of the power and authority
"granted by the statute, but an appropriation of them in
"a manner not contemplated by the legislature or by the
"tax payers' assent. The court said: 'It was evidently
"the intention of the act that money should be raised and
"paid over to aid in the construction of a railroad, and no
"color is given to the idea or position that the credit merely
"of any town should be given, through and by which
"money might be raised.' They, therefore, held that the
"bonds were issued without authority, and as the railroad
"company received them on a consideration not author-
"ized, it was chargeable with a knowledge of their inva-
"lidity, and it never could have enforced them. It was
"further ruled that the plaintiff stood in no better position;
"that having purchased with notice of the manner in
"which they had been issued, he was not a *bona fide*
"holder. *Gould* v. *The Town of Sterling*, 23 N. Y.,

"456, is a similar case, and the ruling of the court was "the same. In *The People* v. *Mead*, 24 Id., 114, we find "a re-assertion of the invalidity of bonds first negotiated "by exchanging them for stock of the railroad company. "The opinion was delivered by DENIO, J. It was, how- "ever, said that a *bona fide* holder, who had no knowl- "edge that the railroad company had received the bonds "in payment for the stock taken for the town, would not "be liable to the defense, which existed against the rail- "road company.

"*Horton* v. *The Town of Thompson*, 71 Id., 513, is "another case in which the Court of Appeals gave the "same construction to another similar statute, holding that "bonds exchanged for stock were unlawfully issued, and "that a purchaser with knowledge that they had been "thus issued, could not enforce them.

"It thus appears to be the settled construction given "by the courts of New York to the act under which the "bonds now in suit were issued, and to other similar acts, "that they do not authorize an exchange of bonds for "shares of the capital stock of railroad companies, and "that a purchaser who had notice at the time of his pur- "chase that such a disposition of the bonds was made by "the town officers or railroad commissioners, cannot re- "cover in a suit brought upon them."

The parallelism between the two cases is exact, except we have the additional defense that we did not even receive stock for our bonds.

The statute in this case provided the bonds should be sold at not less than par. In fact, they have not been sold at all, but even if stock had been received for them, such disposition of them would have been invalid.

The precise question decided by your Honors in *Scipio* v. *Wright* has not been decided by the Supreme Court of this State. The same principle, however, was asserted in *Middleport* v. *Ætna Ins. Co.*, 82 Ill., 563, where, quoting from the syllabus of the case, the court held:

"When a law authorizes the donation of money by "a municipal corporation, to aid in the construction of a "railroad, and provides for levying a tax to raise the "amount to be donated, the officers of the corporation "cannot adopt any other mode of paying the same, and "bonds issued by them to the company for the purpose "of paying such indebtedness are void."

LAWRENCE, CAMPBELL & LAWRENCE, AND
M. T. MOLONEY,
For Plaintiff in Error.

C. B. LAWRENCE,
Of Counsel.

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108-110

IN THE

SUPREME COURT of the UNITED STATES.

October Term, A. D. 1882.

No. 694.

THE CITY OF OTTAWA, *Plaintiff in Error,*
vs.
WILLIAM H. CARY, *Defendant in Error.*

Error to Circuit Court of the United States, for the Northern District of Illinois.

BRIEF AND RE-ARGUMENT

On the part of Defendant in Error.

G. S. ELDREDGE,
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BRIEF AND RE-ARGUMENT

On the part of Defendant in Error.

MAY IT PLEASE THE COURT:

I infer from the grounds upon which this court placed its decision recently announced in this case, through Mr. Justice HARLAN, that what had heretofore been considered by counsel the material and vital questions involved in this case, have not received a full consideration by the court. Hence, I trust I may be pardoned if, in this brief, I travel over the ground, to a considerable extent, covered by a former brief, believing it will be more convenient for the court, on a re-examination of this case, to have the grounds upon which it is claimed the judgment below should be affirmed, here repeated, with such additional suggestions as seem necessary to be presented.

STATEMENT.

This action was brought originally by William H. Carey, the defendant in error, against the city of Ottawa, to recover upon forty bonds, with interest coupons attached thereto, and divers other coupons cut from other bonds of the same series, the bonds and coupons in controversy being precisely of the same character as those involved in *Hackett* v. *Ottawa*, 99 U. S., 86, and in *The City of Ottawa* v. *The First National Bank of Portsmouth*, 105 U. S., 342.

The issues in the two cases are in all respects alike. The questions involved in the pending case embrace those involved in the Hackett and Portsmouth Bank cases, and some others not necessarily involved in those cases.

The findings in the bank case and the case at bar, are not substantially different, except that in the Portsmouth Bank case the court specifically found that the plaintiff below was a *bona fide* purchaser of the bonds, etc., before maturity, for value, without notice of any actual or alleged defense thereto, and the eleventh, twelfth and thirteenth findings in the pending case are not in the record in the bank case. The court found in favor of the plaintiff below, the sum of $72,814.76.

It is insisted on the part of the defendant in error that the decision in *Hackett* v. *Ottawa*, *supra*, is decisive of this case with respect to all the questions now sought to be raised by the plaintiff in error, because (1) the plaintiff below was a *bona fide* purchaser of the bonds and cou-

pons for value before maturity, as in *Hackett* v. *Ottawa*, *supra*, and had the right to rely implicitly upon the recitals appearing upon the face of the bonds; and (2) the city is estopped from denying that it had lawful authority to issue the bonds, or that the *purposes* for which they were issued were not corporate or municipal purposes and within the power conferred by its charter, namely: for a purpose deemed to be, and which was in fact, "*for "the general benefit of the community*," and fully authorized by the constitution of the State of Illinois, as repeatedly construed by the Supreme court of the state and by this court.

By the act of the legislature of Illinois, of February 10, 1853, incorporating the city of Ottawa (laws of 1853, page 296), general power is given to the city "to borrow money "on the credit of the city, 'and to issue bonds' therefor, "and 'to pledge the revenues of the city for the pay- "ment thereof;'" * * * "Provided, that no sum or "sums of money shall be borrowed at a greater interest "than at ten per cent. per annum." (Sec. 3, Art. 5.)

Among the enumerated powers conferred by the charter, it is provided by section 4 of the same article that the city shall have power "to appropriate money and provide "for the payment of the debts and expenses of the city." Section 8 of the same article authorized the city council "to provide the city with water, to erect hydrants and "pumps in the streets for the convenience of the inhabi- "tants."

By section 38 of the same article it is provided that "the city council shall have power to make all ordinances "which shall be necessary and proper for carrying into ex- "ecution the powers specified in this act, so that such or-

"dinances be not repugnant to or inconsistent with the "constitution of the United States, or this state."

The general power to borrow money conferred by section 3 of article 5, is coupled with this restriction only: "No money shall be borrowed by the city council until "the ordinance passed therefor shall be submitted to and "voted for by a majority of the voters of the said city at- "tending an election held for that purpose." (Sec. 20, Art. 10.)

The first and last sections above quoted are set forth *in hæc verba* upon the face of the bonds, vz:

"This is one of a series of one hundred and twenty "bonds of like amount and even date herewith, num- "bered one to one hundred and twenty, respectively, issued "by the city of Ottawa *by virtue of the charter of said "city, wherein is is provided that the city council shall have "power to borrow money on the credit of the city, and to is- "sue bonds therefor, provided that no sum or sums shall be "borrowed at a greater rate of interest than ten per cent. "per annum.* (Art. 5, Sec. 5.) No money shall be bor- "rowed by the city until the ordinance passed therefor "shall be submitted to and voted for by a majority of the "voters of said city attending an election for that purpose. "(Art. 10, Sec. 20.) And also in accordance with a cer- "tain ordinance passed by the city council of said city on "the 15th day of June, A. D. 1869, entitled '*An ordi- "nance to provide for a loan for municipal purposes*' "which was ratified by a *majority* of all the qualified "voters of said city, at an election holden on the 20th day "of July, 1869, and in conformity with an ordinance "passed by the city council of said city on the 30th day "of July, 1869, entitled, 'An ordinance to *carry into effect*

"the ordinance of June 15, 1869, *entitled An ordinance* "*to provide for a loan for municipal purposes.*'"

The attention of the court is first called to the ordinance of the 15th of June, 1869, entitled "An ordinance to pro- "vide for a loan for municipal purposes," which (see Rec., 33) provides as follows: "Be it enacted by the city "council of Ottawa, that the mayor of the city be and he "is hereby authorized to borrow in the name of the city, at "a rate of interest not exceeding ten per cent., $60,000, "*for the use of said city, to be expended in developing the* "*natural advantages of the city for manufacturing purposes;* "and that bonds of the city be issued therefor in sums of "five hundred dollars, with interest, payable annually, said "bonds to be payable one-third in five years, one-third in "ten years, and one-third in fifteen years after the date "thereof; provided, that no application shall be made of "the proceeds of said bonds, except for the purpose afore- "said, and in pursuance of an ordinance to be duly "passed for that purpose by the city council, nor until "the faithful application of the proceeds of such bonds to "the purpose aforesaid shall be secured to the city.

Section 2 provides for the levy of a direct annual tax to be set apart as a separate fund, to be applied to the payment of the interest.

On the 30th of July, 1869, another ordinance was adopted by the city council, entitled, "An ordinance to "carry into effect the ordinance of June 15th, 1869, entitled, "'An ordinance to provide for a loan for municipal pur- "poses.'" This last ordinance, after reciting the adoption of the prior one, at an election held on the 20th of July, 1869, by which it was ratified by a majority of 823 votes, being a majority of the legal voters of the city, provides that the bonds of the city to that amount be issued by the

mayor, in pursuance of the ordinance of June 15, and be delivered to William H. W. Cushman, "to be used *by him* "in developing the natural resources of the surroundings "of the city, and that said Cushman be authorized and "directed to expend the same in the improvement of the "water power upon the Illinois and Fox rivers within the "city and in the immediate vicinity thereof, under the "franchises and powers which have been or may be "granted for that purpose by the legislature of the state, "or which may *hereafter* be granted for that pur- "pose, in the manner which, in his judgment, shall "best secure the practical and permanent use of said "water power in the city and its immediate vicinity; "provided that said Cushman shall execute and "deliver to the mayor an agreement from him to the "city of Ottawa, that he will, without unreasonable or "unnecessary delay, cause a good and substantial dam to "be constructed across the Illinois river above the city, to "bring into use all the available water-power of said riv- "ers at Ottawa, and will construct sufficient head and tail "races to make such water-power available; said races "to be constructed and continued to the Fox river below "the aqueduct and above the island in Fox river, *as fast* "*as the same can be leased at fair and reasonable rates, and* "*be brought into actual operation;* and that he will also "erect a good and substantial dam across Fox river, so as "to make available the water-power of both rivers at Ot- "tawa as soon as the additional water-power created by "such dam across Fox river *can be brought into actual* "*use, by being leased at reasonable and fair rates*, so as to "have all the available water-power of both rivers at Ot- "tawa ready for use as fast as called for. And provided, "also, that said Cushman shall bind himself that if said

"work is not constructed as aforesaid, that he will return "said bonds to the city, or the value of the same, and save "it harmless from all loss on account of the same, * * * "and in case said dam shall not be completed by said "Cushman, then to return a *pro rata* share of said bonds." (See Rec., 33–4.)

In pursuance of this ordinance, the following contract was entered into between the city and Cushman:

"This agreement, made this 2d day of August, A. D. "1869, between William H. W. Cushman, of Ottawa, Illi- "nois, party of the first part, and the city of Ot- "tawa, in the county of LaSalle, Illinois, party of "the second part, witnesseth: that whereas, the "said Cushman has received from the city of Ot- "tawa aforesaid the bonds of said city to the amount of "sixty thousand dollars, to be used in developing the nat- "ural resources of the city, and to be expended in the im- "provement of the water power upon the Illinois and Fox "rivers within the city and in the immediate vicinity thereof, "said bonds having been issued by said city in pursuance "of an ordinance passed by the city council of said city on "the 15th day of June, A. D. 1869, entitled, 'An ordinance "to provide for a loan for municipal purposes,' which was "ratified by the voters of said city on the 20th day of July, "1869, and of an ordinance passed by the city council of "said city on the 30th day of June, A. D. 1869, entitled "'An ordinance to carry into effect the ordinance of June "15th, 1869, entitled, An ordinance to provide for a loan "for municipal purposes;' now, therefore, in consideration "of the premises, the said William H. W. Cushman, for "himself, his heirs, executors and administrators, doth by "these presents covenant and agree to and with the city "of Ottawa, aforesaid, that he will, without unreasonable

"or unnecessary delay, cause a good and substantial dam "to be constructed across the Illinois river, above the city, "sufficient to bring into use all the available water-power "of said river at Ottawa, and will construct sufficient head "and tail races to make such water power available, said "races to be constructed and continued to Fox river, be- "low the aqueduct, and above the island, as fast as the "same may be required for actual use, and as fast as the "water-power can be leased at fair and reasonable rates, "and that he will also construct a good, substantial and "sufficient dam across the Fox river, below the aqueduct, "whenever the same shall be necessary to make available "the water-power of both rivers, at Ottawa, and be neces- "sary for the use of said water-power; and whenever the "said water-power, made available by the construction of "said dam across Fox river, can be leased at fair and rea- "sonable rates, so as to have all the available water-power "of both rivers at Ottawa ready for use as rapidly as "called for. And said Cushman also binds himself, his "heirs, executors and administrators, to and with said city, "that in case said work shall not be performed to the ex- "tent of constructing a dam across the Illinois river, and "races to make the water-power thereby created avail- "able for practical use, that he will return said bonds, "or the value thereof, to the city, and save and keep "harmless the said city from all loss on account of the "same, or on account of the interest accruing thereon. "And in case the work shall be performed to the extent "above indicated, but shall not be completed by the con- "struction of all the dams and races hereinbefore specified, "then said Cushman shall return to said city a *pro rata* "share of said bonds as the value thereof, in the propor- "tion that the cost of the work constructed shall be, as to

"the cost of that part of the work not constructed. The "said Cushman to be exonerated from all liability of any "kind to the city for or on account of said bonds, when he "shall have performed the agreement herein expressed to "be performed by him, at the times stipulated for the per- "formance of the same. The bonds being appropriated "by the city to secure the completion of said work, and "without other consideration than the public benefit result- "ing to the city thereby. And it is hereby agreed that "nothing in this contract, nor in the ordinances therein "referred to, shall give to said city any right, title, interest "or ownership, either in law or equity, in the said improve- "ments when completed according to the conditions and "stipulations herein contained."

The city, at and before the issue of the bonds, had unquestionable corporate power to issue them, and assumed that they were issued for a *corporate purpose*—a municipal purpose. The people gave their sanction to this view of the corporate power of the city under the charter (as to which, however, there can be no question), and of the *corporate purpose* for which the bonds were issued. By their vote to incur the indebtedness and issue the bonds as evidence thereof, this debt was assumed by them *voluntarily, in the exercise of their power to borrow money under their charter*, and not imposed upon them *in invitum*. The purpose, to aid which the bonds were issued, was a public one, and none the less so because it was authorized to be accomplished through the agency of Cushman under existing franchises or such as might thereafter be obtained to promote the accomplishment of the desired improvement—the promotion of which, from its nature, necessarily affected the general interests of the entire community.

The charter, it will be observed, confers the right to issue bonds without restriction as to the amount or purpose (Sec. 3, Art. 5), except that by section 20 of article 10 it is provided that "no money shall be borrowed by "the city council until the ordinance passed therefor shall "be submitted to and voted for by a majority of the "voters of said city attending an election for that pur- "pose." Coupled with this power of incurring indebtedness is conferred the power upon the city council "to "appropriate money and provide for the payment of the "debts and expenses of the city." Hence, as said by Chief Justice WAITE, in the Hackett case, 99 U. S., 86, "It is clear, therefore, that the council, having secured "the assent of the requisite majority of voters, might "rightfully borrow money upon the bonds of the city for "every purpose which could fairly be deemed municipal "or corporate." It will be noticed that as to what is *a municipal purpose, in point of fact, is left to the determination of the voters of the city, which involves simply the question as to whether the measure proposed to be aided by the issue of bonds was one "which would pro- "mote the* general prosperity and welfare of the com- "munity"—a question which could only be determined by the city council in the exercise of its general municipal purposes.

A reference to the ordinance of June 15, 1869 (Rec., 33), discloses that the object of the aid voted was not simply the advancement of the private interest of the Ottawa Manufacturing Company, but the bonds were to be issued and delivered to Cushman, "to develop the "*natural resources* of the surroundings of the city," and he is thereby directed to expend the same *under the franchises and powers granted* or which *might* be granted

by the *legislature* of the state *for that purpose*, in the manner which in his judgment should best secure the practical and permanent *use of the water-power in the city* and its immediate vicinity, and then proceeds to provide in detail for the execution of a contract by Cushman for the faithful performance of the trust imposed upon him, in a certain manner and under certain restrictions, "so as "to make available the water-power of both (the Fox and "Illinois) rivers *at Ottawa*, as soon as the additional "water-power * * * can be brought into use by "being *leased at reasonable and fair rates* * * * as "rapidly as called for." It will be thus seen that the declared purpose was a public purpose, which was proposed to be promoted, viz., to so utilize this water-power that it could be used and leased at reasonable and fair rates; that is to say, it was to be made available to any and all persons who should desire to use it, whether for the purpose of running grist mills, flouring mills, or as a motive power for propelling machinery used for other manufacturing purposes or for domestic use.

By the 8th section of the act of 1851, referred to on page 31 of the record (Private Laws of Illinois of 1851, pages 179 and 180), incorporating the Ottawa Manufacturing Company, it is invested with the right to enter upon and flow lands, and to that end to exercise the *power of eminent domain* by the condemnation of property to the uses required, upon making compensation in damages, through the institution of the proper judicial proceedings, which of course, as held by this court in the Munn case (94 U. S., 113), subjected the corporation to the supervision of the legislature with reference to the manner in which its franchises and privileges should be exercised, and the imposition of tolls or charges for the use

of the water-power, as contemplated by section 8 of the act. (Rec., 30.)

The 8th section of this act is not referred to in the pleas, but is a public act (see section 10, Rec., 32), of which this court will take judicial notice, and is set out *in hæc verba* in the 5th finding of the court below. (Rec., 30.)

It is apparent that the legislature regarded that this manufacturing company and its proposed development of the water-power of the Ottawa and Fox rivers as matters beneficial to the entire community as well as the general public, or it would not have conferred upon this corporation the extraordinary right of the exercise of the power of eminent domain for the condemnation of lands, etc.

I.

THE CITY OF OTTAWA HAD UNDOUBTED CORPORATE POWER TO ISSUE THE BONDS IN QUESTION, IN PURSUANCE OF ITS CHARTER, AND THEY WERE THUS ISSUED FOR LEGITIMATE CORPORATE PURPOSES.

The city issued the bonds in question under its general and indisputable powers conferred by its charter, and so affirms upon the face of the bonds; hence it is entirely immaterial, and against the plaintiff, whether Cushman made any lawful or unlawful or unauthorized appropriation of them. That is matter entirely between the city and Cushman, and if the existing legislation was not sufficient to or did not *authorize the appropriation* of these bonds, when they were thus issued under the general municipal power of the city, which is alleged to have

been made, and *additional legislation* was then required to *authorize Cushman to make such an appropriation of them as was contemplated by the ordinance, and he appropriated the bonds before the additional legislation was procured*, the city, as before suggested, has its remedy for the misappropriation under its contract. So this is simply a question between the city and Cushman, and can not affect the plaintiffs' rights. The ordinance contemplates only a *lawful* appropriation of the bonds issued by the city under its unquestionable municipal powers; and if any unauthorized or unlawful appropriation of them was made, the city is abundantly protected; and it is apparent it meant to and did jealously guard against any appropriation except as lawfully authorized, or which might thereafter be lawfully authorized by the legislature, when the city sanctioned the transfer of these bonds to the Ottawa Manufacturing Company.

According to its own showing by the pleas interposed, the defense of *ultra vires* is a mere afterthought, and a shamefully dishonest attempt of the city to avoid its legal obligations and defraud its bondholders, rather than to seek its remedy, which is ample, against its own public servants and agents, for the breach of any public duty or trust, if any has been committed. It is by no means material to the determination of the question involved, as to the validity of the bonds, whether the city issued its bonds in payment of a stock subscription under an act of the legislature authorizing it, or whether under the general or express powers conferred by its charter. The distinction between a "donation" and a subscription being, as remarked by the Supreme court of Illinois, merely a shadowy one. The question is simply whether the *general purpose* in aid of which bonds are voted is a *public*

purpose, one affecting the general interests of the political community, or of a private character; if the former, and there was legislative authority for it, under its charter, it is a corporate purpose.

In *Maher* v. *The City of Chicago*, 38 Ill., 273, the Supreme court of Illinois say: "If a municipal corporation "dealing with individuals *assumes* that it possesses certain "corporate powers, upon which the validity of its acts de- "pend, and it turns out that it does *not* possess the *specific* "power relied on, it is not thereby excused from the per- "formance of its obligations *if they can be performed* "*through the agency of other powers* which it does pos- "sess."

But I submit that the city had undoubted power to issue its bonds in and of this improvement, independent of any act of the legislature authorizing it to subscribe to the stock of the company, as provided for in the ordinances of the city. As has been before suggested, the issue of the bonds was not a "donation" to a *private* corporation, but was an *appropriation* in aid of a public improvement, which affected the interests of an entire community, and whereby it was sought to enlarge the *local natural* advantages of the city and its surroundings by the development of the water-power, and thus to aid in the establishment of flouring mills and other public enterprises, and to secure the use and enjoyment of these increased privileges upon reasonable terms and without unjust discriminations. It was not, primarily, the direct pecuniary interests of the manufacturing company, as a private corporation, that were sought to be promoted, but the *general* interests of the community, as is apparent from the ordinance. (Rec., 33.) It was a proper *municipal purpose*, which the city might promote through the agency of any individual or

private corporation; hence the provision that the improve- "ments shall be so completed as shall best secure the "practical and permanent use of said water-power in the "city and its immediate vicinity, and that it should be "leased at reasonable and fair rates."

It was urged, however, in the court below, that the issue of the bonds was in violation of section 5 of article 9 of the constitution of Illinois of 1848. This provision this court has frequently had occasion to consider. It is as follows: "The corporate authorities of counties, * * * cities, "etc., may be vested with power to collect and assess "taxes for corporate purposes; such taxes to be uniform "in respect to persons and property within the jurisdic- "tion of the body imposing the same," etc.

There are certain objects which would be readily conceded not to be corporate purposes, and other objects which would be as readily conceded were corporate purposes, and still other objects, to determine the character of which, in this regard, resort would necessarily be had to *extraneous matters;* and when the legislature has declared those of the latter class to be proper subjects of municipal aid by taxation in any form for their promotion, the courts have ever refrained from assuming to judicially overrule the judgment of the legislature.

The Supreme court of Illinois, in *Taylor* v. *Thompson*, 42 Ill., 11 (in an opinion delivered by the learned counsel for the defendant in error, then one of the members of that court), says: "When, therefore, the legislature has "authorized the levy of certain taxes, and has thereby "declared them to be, *in its opinion*, taxes for *corporate* "*purposes*, we should not hold such taxes to be unconsti- "tutional, *merely because their corporate character admits* "*of some debate*. A proper respect for the legislative

"department of the government requires us to regard its "acts as *prima facie* constitutional; * * * that the "framers of the constitution deemed that they had fur- "nished *all* the safeguards that were necessary in this "behalf, when they provided for absolute equality of tax- "ation; and that they thought it unwise to hamper the "legislature by any restrictions as to either the subjects "or purposes of taxation, is evident from the sixth section "of the ninth article above quoted. That section pro- "vides that the specification of the objects and subjects of "taxation shall not deprive the general assembly of the "power to require other objects or subjects to be taxed. "* * * And who will deny that this was a wise ab- "stinence on their part, when we take into view the ever- "varying emergencies of society, and the rapid develop- "ment and unforeseen needs of our modern civilization?" The court then proceeds to determine that a tax imposed by the corporate authorities of a township, to pay bounties to persons who should thereafter enlist or be drafted into the army, was constitutional within the meaning of the fifth and sixth sections of article nine of the constitution of the state.

The learned counsel, Judge Lawrence (who himself delivered this opinion), insisted, upon the argument of this case in the court below, that it was entitled to no weight as authority, and was rendered simply in obedience to the exigencies of the times, which demanded a strained construction of the constitution, to further all efforts to suppress the war of the Rebellion. However this may be, and whatever may be said as to the propriety of the decision of the court in that particular case, *the definition* of the term "*corporate purposes*," as defined in the constitution, expressed in the opinion delivered, is a sound one,

and one which has never been in any substantial degree overruled or qualified by any subsequent decision of that court, but on the contrary, has been subsequently endorsed and approved; and, with due respect to our learned friend on the other side, we submit that he is not now, while acting professionally, authorized to retract what he before judicially pronounced as the unanimous judgment of the Supreme court of the state, and which has ever since been adhered to by this court.

In the case of *Burr* v. *The City of Carbondale*, 76 Ill., 455, a tax imposed by the city in support of the Southern Illinois Normal University, to which the people had voted aid under an act of the legislature, was held valid within the provision of the constitution above quoted, and that the aid being *so voted*, the taxes were not imposed *in invitum* (Opinion, p. 468); and Chief Justice BREESE, in referring to *Taylor* v. *Thompson*, *supra*, says it was there "held to mean a tax to be expended in a manner which "should promote the general prosperity and welfare of "the municipality which levied it, * * *but in that "case a vote of the people authorizing the tax was first "to be taken, and the people, in fact, voted the tax. This "was an important fact in determining that case. We "thought it difficult to determine with precision what was "a 'corporate purpose,' in the sense of the constitution, but "came to the conclusion that it was such a purpose, and "such only, as might have a legitimate connection with ob-"jects and purposes promotive of the welfare of the muni-"cipality, and a manifest relation thereto." (Opinion, p. 464.)

Brisco v. *Allison*, 43 Ill., 291.
Johnson v. *Campbell*, 49 Ill., 316.
Misner v. *Bullard*, 43 Ill., 470.

And in *The Chicago, etc., R. R. Co.* v. *Smith*, 62 Ill., 227, the court say: "In *Taylor* v. *Thompson* this court "defined a *corporate purpose* to mean '*a tax to be ex-* "*pended in a manner which shall promote the general* "*prosperity and welfare of the municipality which levies* "*it*,' *and the court declares that the distinction between* "*a donation and a subscription is more shadowy than* "*real*"—*in fact, in view of the court, entirely shadowy.*

The court, in *The People* v. *Dupuy*, 71 Ill., 653–5, point out the distinction between those municipal corporations enumerated in the constitution, and *quasi* corporations not named, and which have no general municipal powers such as are possessed by towns and cities, and therefore limited in their powers of taxation to the precise purpose they are created to subserve; and the court in this case again recognized and approved the doctrine of *Taylor* v. *Thompson* (p. 655).

The doctrine of the case last cited was again pronounced in *The People* v. *Trustees of Schools*, 78 Ill., 136. And again most emphatically in *Burr* v. *Carbondale*, *supra*, which case is worthy of special attention. And more recently still, *The Quincy, etc., R. R. Co.* v. *Morris*, 84 Ill., 410. By the latter case, the difference between municipal corporations, such as cities and towns, and *quasi* municipal corporations, such as school districts, etc., is also clearly defined, wherein the court held that a subscription by the city *to a railroad company in Missouri* was for a corporate purpose; and the court say (p. 419): "To say that an enterprise of this character "would add nothing to the *commerce and prosperity of* "*the city*, would do no less than repudiate what has been "held in this court in the numerous cases from *Johnson* "v. *Stark Co.*, down to the present time." And see also *Hensley Township* v. *The People*, 84 Ill., 544.

The power conferred by section 3 of the charter of the city, "to borrow money on the credit of the city, and to "issue bonds therefor, and pledge the revenues of the "city for the payment thereof," gives the unquestionable right to the city to borrow money for any "corporate "purpose" within the meaning of the constitution. The right of cities, etc., to borrow money and issue bonds in aid of railroad enterprises has been sustained simply for the reason that such aid in the establishment of public highways was deemed to be for a corporate purpose; but that while such indebtedness could not be imposed upon the political community *in invitum*, yet if the people were permitted to vote upon the question, and *did vote* to issue bonds under the law, they have uniformly been held valid.

The question as to whether the bonds in the suit are valid, involves the question of the validity of commercial securities, which this court will determine for itself. They have never been held invalid by the state court, but on the contrary, their validity has been affirmed by that court, and we submit they are unquestionably sustainable as valid obligations under the constitution of the state. This court, in *Pine Grove* v. *Talcott*, 19 Wall., 666, said:

"Questions relating to bonds issued in a negotiable form, "under an act of a state legislature, involving questions "relating to commercial securities, and whether, under "the constitution of the state, such securities are valid or "void, belongs to the domain of general jurisprudence. "This court will accordingly not follow the decisions of "the court of the state where the bonds are issued, as to "their validity and constitutionality under the laws and "constitution of the state, if the judges here disprove of "those decisions."

The improvement, in aid of which the bonds in question were issued, was clearly one for the general benefit of the city, proposed to be effected through the agency of a private corporation; the object being to obtain an additional supply of water-power, and to utilize it in any manner which would subserve the interests of the people, and by which it might be supplied at fair rates for any and all general purposes, whether to propel grist mills, flouring mills, saw mills, or other machinery used in connection with any other industrial interests. It is evident that the object of the creation of this corporation was not exclusively for the carrying on of a *manufacturing business* for its own private benefit, but it was expressly authorized to "*lease*" *the water-power to others*, as provided by the ordinance of July 30, 1869 (Rec., 33–4), *and the bonds were issued to secure these advantages to the general public*, and under a contract with Cushman, whereby such a distribution of the advantages was provided for, and ample indemnity also provided for the fulfillment of this provision.

By secton 8 of article 5 of the city charter, express power is given "to provide the city with water and "erect hydrants and pumps in the streets." Certainly no one will question but that this was a corporate purpose; nor can it be doubted that the city had ample power to contract with this corporation as well as with any private individual for such a supply of water for general purposes; nor can it be questioned that under the contract with Cushman the city had the right to demand the leasing at fair rates of so much of the water-power proposed to be created, as should be required to supply the hydrants in the streets, whether for domestic use or to maintain a system of water works for the extinguishment of fires. That such were legitimate public purposes—municipal

purposes—will not be denied, and no doubt largely influenced the city to issue the bonds and enter into the contract set out. We confidently submit that the power of the city to issue bonds for the above purposes cannot be seriously doubted.

That such were "public purposes" as defined by the decisions of the Supreme court of Illinois, in the cases cited, seems clear; that such powers fall within that class of powers the necessity for the execution of which, in the attainment of a public purpose, as said by the Supreme court of Illinois in *Taylor* v. *Thompson*, and their numerous other cases, *supra*, may be safely confided to the legislature to define.

The distinction between *corporate power* and *a corporate purpose* must be kept in view.

The power conferred by the charter of the city of Ottawa is a general *unrestricted* power "to borrow money "* * * and issue bonds," which, under the rule laid down by this court, and under the decisions of the Supreme court of Illinois, will sustain bonds issued for any public purpose, and especially in aid of an object manifestly beneficial to the entire community, and *declared by the legislature to be a public purpose*, and authorized to be accomplished through the agency of a private corporation vested with the exercise of the power of eminent domain. It was earnestly contended on the trial in the court below that the case of the *Loan Association* v. *Topeka*, 20 Wall., 661, was decisive of the case at bar, but we submit that there are no material points of resemblance in the cases. The Topeka case was purely an appropriation in aid of a private individual enterprise, not affecting the public interest further than would the establishment of any other private manufacturing enterprise. The distinction

between that case and one of the nature of the case at bar is very clearly illustrated by the opinion of this court in *Beasley* v. *Burlington*, 94 U. S., 312; but the case at bar is a much stronger one to sustain an appropriation in aid of a "public purpose" than is the Beasley case, for the reasons already suggested. If an appropriation in aid of a steam grist mill is an appropriation for a public purpose, certainly an appropriation in aid of an enterprise whereby water-works for general domestic purposes, or strictly municipal purposes, or to promote the establishment of grist mills, flouring mills, and other general objects of industry, whereby these advantages are secured to an entire community, are certainly none the less so.

The city having corporate power to borrow money and issue bonds therefor upon a vote of the people, the real question is, was the purpose for which the bonds were issued a corporate purpose within the definition in *Taylor* v. *Thompson* which the legislature might authorize a municipal corporation to aid, which possessed no general power of borrowing money? If it was proposed to issue bonds to pay a stock subscription to a railroad or other corporation or other extraneous object, it is conceded that such, not being local in its character the city could not in the exercise of its *ordinary* corporate powers exercise its taxing powers in aid of it without direct legislative authority; but under the power contained in the charter it may issue bonds for any purpose beneficial to the entire community, of a purely local character, as effectively as it might do if express legislative authority had been given therefor. In other words, it may thus aid any object or subject under its general powers of taxation local in its character which the legislature might confer on a municipal corporation not possessing general power of borrowing money and issuing bonds.

The legislature having granted the franchises (including the right of the exercise of the power of eminent domain to the Ottawa Manufacturing Company, under the decision in the case of *Munn* v. *Illinois*, 94 U. S., 112, has the undoubted right to regulate and control this manufacturing company in regard to the manner in which it shall exercise its franchises and privileges, not only in the exercise of the power of eminent domain in the acquisition of property, but in the imposition of tolls and charges for the use of its water-power, and to provide against unjust discriminations and impositions upon the public. (See *Beasley* v. *Burlington*, *supra*.)

As a strongly analagous case, the attention of the court is asked to *The People* v. *Kelly*, 76 N. Y., 477, where an indebtedness was incurred to aid in the construction of the bridge between New York and Brooklyn, which was held to be for a public purpose, notwithstanding the bridge company was a private corporation, and there existed the following constitutional restriction, viz:

"No county, city, town or village shall hereafter give "any money or property, or loan its credit to, or in aid of "any individual, association or corporation, or become, "directly or indirectly, the owner of stock in, or bonds "of any association or corporation; nor shall such "county, city, town or village be allowed to incur any "indetedness, *except for county, city, town or village pur-* "*poses.*"

The court say (pages 486 to 490):

"The act of 1875 is not, as claimed by the appellant, "in conflict with the constitutional provision above "recited. It was not the purpose or effect of the "act to make the city of New York a stockholder

"in the bridge company, or to cause it to loan any "money or credit to such company. * * * * * "Nor can it be said that the indebtedness authorized to be "incurred by the city for the construction of the bridge, "was not for a city purpose. *It is impossible to define in a "general way, with entire accuracy, what a city purpose is, "within the meaning of the constitution. Each case must "largely depend upon its own facts*, and the meaning of "these words must be evolved by a process of exclusion "and inclusion in judicial construction. It would not be a "city purpose for the city of New York to build a rail-"road from that city to Philadelphia, or to improve the "navigation of the Hudson river generally, between that "city and the city of Albany, although incidental benefits "might flow to the city. Such works have never been "regarded as within the legitimate scope of municipal "government. On the contrary, *it would be a city pur-"pose to puchase a supply of water outside of the city, and "convey it into the city*, and for such a purpose a city debt "could be created. So lands for a park for the health "and comfort of the inhabitants of a city could be pur-"chased outside of the city limits, and yet conveniently "near thereto. *Such improvements are for the common "and general benefit of all the citizens, and have always "been regarded as within the scope of municipal govern-"ment;* and so, too, highways or streets leading into a "city or village may be improved, provided the improve-"ments be confined within *such limits* that they may be re-"garded as for the *common benefit and enjoyment of all the "citizens.* It cannot, therefore, well be held, as claimed by "the learned counsel for the appellants, that what is meant "by a *city purpose*, is some work or expenditure *within "the city limits.* There could be no good reason for such

"a limitation. It could be no worse for a city to incur "debt for *a city purpose outside of the city limits than for* "*one within such limits*, and there is just as much reason "for allowing it to be incurred in the one case as in the "other.

"* * * But as to the dividing line between what "is a municipal purpose, and what is not, is in many cases "shadowy and uncertain, great weight should be given "by the courts to the legislative determination, and its "action should not be annulled unless the purpose appears "clearly to be one not authorized. As said by Judge "Folger in *Weismer* v. *Village of Douglas*, 64 N. Y., 91: "'*If the purpose designed by the legislature lies so near the* "*border line, that it may be doubtful on which side of it it is* "*domiciled, the courts may not set their judgment against* "*that of the law makers.*' * * * *Therefore, having* "*nothing to say about the wisdom of the legislation under* "*consideration, I am confident in the conclusion that the* "*construction of this bridge is a city purpose of each city,* "*and that each city can incur debt for the same, and that* "*the act of 1875 is not in conflict with any provision of the* "*constitution.*"

This case is a most emphatic indorsement of the doctrine of *Taylor* v. *Thompson*, and the other Illinois cases *supra*, and the logic of it seems unanswerable.

In *Livingston County* v. *Darlington*, 101 U. S., 407, the whole subject as to what is a corporate purpose, within the interpretation of that term, as given by the Supreme court of Illinois, in construing the constitution of that state, was very fully considered, and the authorities bearing upon the question elaborately reviewed, from the early case of *Taylor* v. *Thompson* down to the present time. This court there say in *Taylor* v. *Thompson* it was

held "that a tax for a corporate purpose is a tax to be "expended in a manner which shall promote the general "prosperity and welfare of the municipality which levies "it. * * * And if it appears that a tax has been "voted and levied with an honest purpose to promote "the general well being of the municipality, and was not "designed merely for the benefit of individuals or of a class, "its collection would not be stayed by the courts."

The general power of the city of Ottawa to borrow money and issue bonds, as stated by Mr. J. Harlan, in *Hackett* v. *Ottawa* (99 U. S., 93), is without limitation as to the amount or purpose for which the same might be done. As stated by the learned justice in that case, "it "is clear that the council, having secured the consent of "the requisite majority of voters, might rightfully borrow "money upon bonds of the city *for every purpose which* "*could fairly be deemed municipal or corporate.*"

While this court in that case declined to place its decision upon the sole question of a corporate purpose, it is, nevertheless, said that "in view of the course of de-"cisions in Illinois, we should hesitate to declare that "money borrowed by the city of Ottawa to be expended "in deveolping its *natural resources for manufacturing pur-*"*poses*, was not in the sense of the constitution of 1848, "as interpreted by the Supreme court of that state, ex-"pended 'to promote the general prosperity and welfare "of the municipality.'" (Page 94.)

The decree in *Wilson* v. *The Ottawa Manufacturing Company et al.* heretofore filed, finds from the evidence in that case (as was admitted by demurrer in *Hackett* v. *Ottawa*, *supra*, and found by the United States Circuit court in the case at bar), that by an ordinance adopted by the city on the 15th day of June, 1869, entitled "An or-

"dinance to provide for a loan for municipal purposes," the *mayor of the city was authorized* to borrow in the name of the city a sum not to exceed $60,000 (not to aid the Ottawa Manufacturing Company, but, as found by the Circuit and Supreme courts of the state, and by the United States Circuit court), "*to be expended in developing* "*the natural advantages of the city for manufacturing* "*purposes.*" That in pursuance of the ordinance of the 30th of July, 1869, entitled "An ordinance to carry into "effect an ordinance of June 15, 1869, the said city "of Ottawa caused to be issued bonds of said city to the "amount of $60,000, for the purposes aforesaid, and pro- "vided that said bonds should be placed in the hands of "William H. W. Cushman, to be by him expended for "the purposes *aforesaid*," in the improvement of the water power in the Illinois and Fox rivers within the city, or in the immediate vicinity thereof, in pursuance of the identical agreement recited in the ordinance of the 30th of July, 1869 (see Rec., 33), and the agreement with Cushman embodied in the seventh finding of United States Circuit court (see Rec., 35–6; also see printed copy of decree in LaSalle Circuit court, pages 7 and 8.)

The decree (see printed copy, pages 8 and 9) further recites, as found by the United States Circuit court, that Cushman executed his bond to the city for the performance of the conditions contained in his contract, and that upon the execution thereof, the bonds were delivered to him. (See page 9.)

This decree further finds that subsequently, in February, 1871, Cushman, with the knowledge and consent of the city, delivered the bonds to the manufacturing company; which company thereupon assumed the completion and performance of the conditions of Cushman's contract

with the city, and placed the bonds in its treasury, and that they were thereafter sold by the company and converted into money. This fund was distributed among a portion of the stockholders of the corporation, and the bill in that case was filed for the purpose of subjecting these parties, who thus appropriated this portion of the corporate funds of the company, viz: *these identical bonds*, to the payment of the judgments recovered against the company by the complainant.

A copy of this decree is filed for the purpose of indicating with certainty the force and effect of the decision of the Supreme court of Illinois in *Wilson* v. *Manufacturing Company*.

It will be seen from the copy of the opinion in this case, that the Supreme court of Illinois, in affirming the findings and decree of the Circuit court, took precisely the same view of the corporate power of the city of Ottawa to issue the bonds in question that was taken by this court in *Hackett* v. *Ottawa*, *supra*. See 104 Ills. (advance sheets, page 54), and certified copy of opinion heretofore filed.

Mr. J. MULKEY, after reciting the facts, says (see printed opinion, *Wilson* v. *Ott. Mnfg. Co.*, page 22):

"*That the city council of the city of Ottawa having* "*the requisite power for that purpose, on or about the* "*15th of June, 1869, issued in the name of the city, $60,000* "*in bonds, which were delivered to the said William H.* "*W. Cushman, to be by him expended in the improve-* "*ment of the water power afforded by the Illinois and* "*Fox rivers*, by building dams across the same, *the city* "*taking from him at the time an indemnity contract*, by "which he bound himself to either construct the dams in

"a reasonable time, or refund the bonds or their pro-
"ceeds, or otherwise keep the city harmless with respect
"to their issue. That Cushman, on or about the 2d of
"February, 1871, with the assent of the city, delivered
"the bonds in question to the Ottawa Manufacturing
"Company, and that company thereupon entered into a
"bond by which it asssumed the performance of Cush-
"man's contract with the city; that upon this delivery of
"these bonds to the company, or shortly thereafter, the
"directors of the company issued stock, representing the
"same to the following named persons," etc. (See printed copy of opinion filed herewith, pages 21–23.)

It will be thus seen that it was held, in accordance with the decision of this court in *Hackett* v. *Ottawa*, that the city had:

(1.) Corporate power under its charter to issue bonds for any purpose beneficial to the general welfare of the community.

(2.) That the bonds in question were issued for legitimate municipal purposes.

(3.) The "donation," as it is termed, was not a *donation* in the popular sense of the term, but an appropriation of $60,000 for the improvement of the natural resources of the city for manufacturing purposes, by erecting dams across the Illinois and Fox rivers, in pursuance of a contract with Cushman, the performance of which, by him, was made *the consideration* for the issue of the $60,000 of bonds—the work which was undertaken to be performed by him and which was deemed by the city to be for the general benefit of the citizens, as the contract with Cushman (set out in the 7th finding of the United States Circuit court) recites that Cushman was to con-

struct a good and substantial dam across the Illinois river above the city, sufficient so as to bring into use all the available power of said river at Ottawa, and also construct sufficient head and tail races to make such water-power available, and by uniting them with the waters of the Fox river, "*as fast as the same might be required for actual* "*use, and as fast as the water-power* can be leased at fair "and reasonable rates; * * * and whenever the said "water-power, made available by the construction of said "nam across said river, can be leased at fair and reason- "able rates, so as to have all the available water-power "of both rivers at Ottawa ready for use as rapidly as "called for." The said Cushman also binds himself, to and with the said city, "that in case said work is not per- "formed to the extent of constructing a dam across the "Illinois river and races to make water power thereby "created available for practical use, that he will return "said bonds, or the value thereof, to the city, and save and "keep harmless the said city from all loss on account of "the same, * * * and in case the work shall be per- "formed to the extent above indicated, but shall *not be* "*completed by the construction of all the dams and races* "*heretofore specified, than said Chushman shall return to* "*said city a pro rata share of said bonds, or the value* "*thereof, in proportion that the cost of the work constructed* "*shall bear to the cost of that part* of the work not con- "structed."

It is further provided in the contract "nothing in this "contract, nor in the ordinances therein referred to, shall "give the said city any right, title, interest or owner- "ship whatever in law or in equity in the said improve- "ments, when completed, according to the conditions and "stipulations herein contained."

Mr. J. MULKEY, in *Wilson* v. *The Manufacturing Co.*, further says (see printed copy of opinion, page 29):

"They (the bonds) were clearly given to him to be ex-"pended, as they subsequently were, by the company "in building the dams across the two rivers. His lia-"bility under his contract with the city on account of the "bonds was merely contingent, *and absolutely ceased* "*when the bonds were thus used and the dams completed.* "*Cushman turned over the bonds to the company to be* "*used in the manner they were, in consideration that the* "*company would indemnify him against all liability on* "*account of his contract with the city, which the com-*"*pany did.* * * * * The actual transaction be-"tween the parties, when relieved of the little mist which "the argument of counsel throws around it, is simply this: "The city of Ottawa made a donation of $60,000 in "bonds, to be applied in building dams across the Illi-"nois and Fox Rivers, and these dams were built by "the company, and the funds faithfully applied to that "purpose, and Cushman and his confederates have re-"ceived the value of the bonds in the company's stock."

It will be thus seen that there was no connection whatever, and there was never intended to be any connection between the city of Ottawa, in its municipal capacity as a stockholder, and the Ottawa Manufacturing Company as a private corporation.

The determination of the Supreme court of Illinois in this case, under the rule of decision in this court, is and ought to be *conclusive upon the question of the authority of the city to issue the bonds involved, for the purposes for which they were issued.*

The citation of this case causes the learned counsel for

plaintiff in error to laugh, as he blandly remarks—he is noted for his serenity and his *smiles;* but it would indeed be amusing if the Supreme court of Illinois should gravely adjudicate that the stockholders in a private corporation should be held liable to account for the proceeds of worthless, illegal bonds, issued in violation of the constitution, and *malum prohibitum*, as these bonds in question are claimed by counsel for plaintiff in error to be, and render a decree against members of a corporation requiring them to account for the proceeds of such worthless paper, to which neither they nor the corporation could have acquired any title which a court of equity would recognize.

In *Johnson* v. *Stark Co.*, cited by plaintiff's counsel, page 16, the Supreme court of Illinois, in defense of the constitutional right of a *county* having *no general* power to create a debt, said:

"By its completion, the public have increased facilities "for *travel and transportation*, the shareholders the pros- "pect of profit on their investment, and the citizens of the "county have afforded to them *increased facilities for* "*trade and commerce, and enhanced value to property* "*within their local divisions, with the more speedy develop-* "*ment of their agricultural and other resources.*"

The ordinances and the contract with Cushman, both guardedly avoid the creation of any such relations.

It further appears that the appropriation of this $60,000 was not a *gratuity* on the part of the city to the manufacturing company, as has been assumed, but was founded upon this express consideration, viz: The erection of dams, by which the natural resources of the city, for *general manufacturing purposes*, might be promoted, and the water power made available for "general use," by

being leased at reasonable and fair rates to all the citizens who might desire to avail themselves of the natural facilities for carrying on various *industrial pursuits* which might be thus rendered "available" by the construction of the dams.

The term "*donation*," before remarked, as applied to such appropriations, does not *ex vi termini*, imply a *gratuity;* thus in *Goodman* v. *Beloit*, 21 Wis., 686, it was held that the "donation" of $1,000 to the plaintiff for the use of a bridge over the river at a certain point in the town, provided the plaintiff would, by a day named, erect a substantial bridge over the river at that point, *must be intended to mean an agreement founded upon a sufficient consideration*, and not a gratuity. So an appropriation made by the city to a private person or corporation, in consideration of which it was agreed to improve a public street, levee, or other public grounds, for the benefit of the people generally, in common parlance, it is designated a "donation," but it would nevertheless be a lawful appropriation, and not a gratuity. An appropriation to be expended for a public celebration would be a gratuity—a donation, but the distinction between a donation or gratuity and an *appropriation* for something valuable and beneficial is too apparent to be discussed.

Here we have all the elements necessary and usually found in a contract containing mutual obligations for the accomplishment of a desired purpose, mutually advantageous to the parties thereto.

As has been before suggested, the bonds were simply issued to provide the means to effectuate a general purpose, deemed beneficial to the entire community, which object it was proposed to effectuate through Cushman's

instrumentality under a contract with him, *upon the faith of his personal responsibility.*

As stated by this court in *White* v. *R. R. Co.*, 21 How., 575, where a municipal corporation has express or implied power to accomplish a general purpose, it has the right, unless specially restricted, to create a debt by the issue of bonds for its accomplishment. It has an implied power to create a debt, whenever necessary to carry out an express power conferred with respect to such contracts; it is to be regarded *quo ad hoc*, a private corporation. (See also *City of Galena* v. *Corwith*, 48 Ill., 423.)

Neither a county, township, school district or *quasi* municipal corporation, possessing *no general municipal powers*, has authority to borrow money, except as *expressly provided by law*, so as to all the authorities which have been cited as adverse to the validity of the bonds in question and involving the exercise *of corporate power* by such corporations they have no bearing on this case. The distinction is this: The city of Ottawa, as is shown, under its charter, is represented by its common council, and possesses *general municipal powers, and by its charter is authorized to borrow money, if sanctioned by a vote of the people. It may therefore borrow it for any corporate porpose, which is defined in Taylor* v. *Thompson*, 42 Ill., 9, to mean "a tax to be expended *in any manner* "*which shall promote the general prosperity of the com-*"*munity which levies it.*"

This definition of a *corporate purpose* has been steadily adhered to and endorsed in the numerous cases heretofore cited.

In *People* v. *Dupuy*, 71 Ill., 651, the Supreme court of Illinois say "*they are such purposes as are germain to the* "*welfare of the municipality.*"

In *Burr* v. *Carbondale*, 76 Ill., 455, the tax was voted in aid of the State Normal University. The court say: "Here complainants *by a vote of the citizens and property* "*owners of the municipality, voluntarily imposed this tax* "*upon themselves*, being authorized to do so by the laws of "the state which the general assembly had the constitu- "tional power to pass."

In the *Quincy and Missouri R. R. Co.* v. *Morris*, 84 Ill., 410, the question involved was whether the bonds issued in aid of a railroad *in another state*, viz: Missouri, were held valid.

The court say (page 417): "The theory upon which "these decisions hold a debt created for the construction "of a railroad to be a corporate purpose (under the "constitution of 1848) is, *that the trade and commerce of* "*the municipality is increased property, is enhanced, and* "*the general prosperity and welfare of the entire mu-* "*nicipality are promoted.* * * * No argument is "needed to demonstrate that a city is more interested and "derives more benefit from a public improvement, such "as the construction of a railroad, extending from the "city west into the State of Missouri, than east through "our own state. * * * *Her merchants supply the* "*country west with goods, her manufactories furnish the* "*various implements of husbandry, and in turn she re-* "*ceives the various products of the country.* * * * "*Under the authorities, we are of the opinion that the debt* "*in question was legally created*, AND FOR A CORPORATE "PURPOSE."

In *Hensley Township* v. *The People*, 84 Ill., 544, the "bonds involved were issued to secure the establishment "of an industrial university at Urbana."

The court say: "We can only consider the *power* of

"the legislature to adopt any and all laws. If *that de-*
"*partment has the constitutional power to make the enact-*
"*ment we have nothing to do with the policy.*" (Page 550.)

In *Hackett* v. *Ottawa*, 99 U. S., it is said by this court (page 93): "*We have seen that the charter of the* "*city confers upon the council of the city, power to borrow* "*money upon the credit of the city and issue bonds therefor.* "*No limitation is prescribed* as to the amount. Nor is "any express restriction imposed as to the objects or "purposes for which bonds may be issued.

"*It is clear, therefore, that the council having secured* "*the assent of the requisite majority of voters, might* "*rightfully borrow money upon the bonds of the city for* "*every purpose which could fairly be deemed municipal* "*or corporate.*"

This court then proceed to review the rule of decision in Illinois, in which all the leading cases, up to the time of this decision are commented upon. And again, in *Livingston County* v. *Darlington*, 101 U. S., 407, adopting the definition in *Taylor* v. *Thompson*, and the later case of *C., D. & V. R. R. Co.* v. *Smith*, 62 Ill., 268, viz.: "If "it was for a public purpose—*for the benefit of the inhab-* "*itants of the municipality—then it would be for a corpor-* "*ate purpose.* The latter cannot be distinguished from "the former; and all we have said with relation to the "public purpose of the tax will apply with equal force to "a corporate power."

Here there was legislative authority for the construction of the dams for "manufacturing and hydraulic purposes" and among other things for the purpose of creating a "*water-power with the right to use, lease or otherwise* "*dispose of the same*" (32 Rep., 36), and with the right to

exercise the power of eminent domain in the acquisition and overflow of land, etc.

This act has never been declared unconstitutional by the Supreme court of Illinois, and under the rule of decision of this court in *Harter* v. *Kernochan*, 103 U. S., 562–570, and *Darlington* v. *Livingston County*, *supra*, its constitutionality cannot be questioned. Now, if the city had power (as it must be conceded it had) to issue bonds for any purpose *beneficial to the entire community* when sanctioned by a vote of the people, can any one question its authority to promote the general interests of the community by *developing its local and natural advantages for manufacturing purposes, whereby this water supply might be made available to all classes without distinction*, for all general purposes, whether municipal or private, and whereby it might *be obtainable by being leased at fair and reasonable rates without unjust discrimination.*

The very principle upon which aid is permitted to be voted to railroads under the constitution of Illinois, as said in *R. R. Co.* v. *Morris*, *supra*, is and always has been, that it *promotes commercial and manufacturing interests*, and thus be made available to the citizens generally. This is an entirely different question from the issue of bonds in aid of private persons or corporations in which the municipality can have no interest except in the incidental results growing from the prosperity of the single enterprise in aid of which bonds are voted, whereas in this case it was designed to secure the utilization of this water-power to the citizens generally at reasonable and fair rates, so that it should be secured to any and all citizens desiring it without discrimination.

With what show or pretense of reason or justice can it be said that municipal aid to pay bounties to soldiers, to

build colleges and state institutions of learning, reform schools for juvenile offenders (which latter would seem rather to be a nuisance to any community than a benefit), agricultural schools and the like are *legitimate corporate municipal purposes* under the constitution, while to develop the *local natural advantages of a town for manufacturing purposes and promote its commercial and industrial pursuits* affecting the general welfare and prosperity of the entire community, are not legitimate municipal purposes. This pretended discrimination sought to be made against the latter—for it is but a pretense which no man of sense can defend—is groundless. If any discrimination is to be made it should be in favor of the latter and against the class of objects first enumerated.

The object *expressed* in the contract with Cushman was the promotion of the public interests. It was a matter affecting the interests of the citizens generally, as much as the construction of highways, bridges and railroads.

With what propriety can it be said that it is a public purpose to aid a railroad in a neighboring state to increase the trade and commerce of the municipality, and *thus* promote the general prosperity and welfare of the entire municipality, *but to aid and promote the local natural advantages of the city for municipal purposes, and necessarily for commercial and manufacturing purposes, by which the entire industrial interests of the community are promoted, is not a public purpose.* The distinction, if it is to be made, is simply a distinction without a difference. It is believed that no such finified notion can receive the sanction of this court.

If the city proposed to enter upon the building of a railroad or other extraneous object, by subscribing for stock, it is conceded that such would not be within its ordinary

corporate powers, and could not be done except by direct legislative sanction; hence, as I have before had occasion to say, if the purpose sought to be aided was *local* in its character, involving no connection of the city with any purely private enterprise, but, as is apparent, was intended and calculated to promote the interests of the whole community, by enhancing its manufacturing, commercial and industrial interests, it was such a purpose as the city had the right to promote by the issue of its bonds, *under its charter*, if sanctioned by a vote of the people; and such a purpose as the legislature might authorize a county or other municipal corporation not having general power to borrow money, to aid by special enactment.

The city of Ottawa, under its unrestricted power to "borrow money" and "issue bonds," when sanctioned by a vote of the people, had all the power possessed by the cities of Muscatine and Dubuque, which were respectively authorized by their charters "to borrow money for any object in their "discretion," upon a vote of two-thirds of the citizens in these two cases (1 Wall., 384, 203), or that was possessed by the city of Burlington, authorizing the city "to "borrow money *for any public purpose*, upon the vote of "two-thirds of all the votes polled" (3 Wall., 654, *supra*), where this court sanctioned the validity of the bonds *in aid of a railroad, although there was a special act of the legislature under which the city was authorized to subscribe for and take stock in the railroad company*. The legislature conferred upon the city of Ottawa the power to issue bonds for any public purpose in its discretion, upon a vote of the people, without restriction as to the amount or specification as to the purpose, which it had the undoubted power to do under the constitution of Illinois of 1848; and, as said by the Supreme court in *Hensley Township*

v. *The People*, 84 Ill., 544: "We can only consider the "power of the legislature to adopt any and all laws. If "that department has the constitutional power to make "the enactment, we have nothing to do with the policy."

In *Meyer* v. *Muscatine*, 1 Wall., 384, by paragraph 15, of section 19, of the charter of the city of Muscatine, the city was authorized "*to borrow money for any object* "*in its discretion*, if at a regular meeting entered into, "stating distinctly the nature and object of the loan, and "amount thereof, as nearly as practicable—the city deter- "mined in favor of the loan, by a majority of two-thirds "of the votes given at the election." (See page 386.)

The court say (page 390): "The charter gave the city "authority to borrow money, *for any object in its discre-* "*tion*, in conformity to the provisions cited," and affirmed the validity of the bonds in question. In *Gelpcke* v. *Dubuque*, 1 Wall., 203, it was held that a like charter provision conferred ample authority for the issue of the bonds.

In *Rogers* v. *Burlington*, 3 Wall., 654, it was provided in the charter under consideration in that case, "that "whenever, *in the opinion of the city council*, it is expe- "dient to *borrow money for any public purpose*, the ques- "tion shall be submitted to the citizens of Burlington, the "nature and object of the loan thereof stated, and a day "fixed for the electors of the said city to express their "wishes, * * * * * the loan shall not be made "unless two-thirds of all the votes polled at such election "shall be given in the affirmative."

Under this assumed authority an ordinance was passed providing for a vote upon the question of issuing bonds to the Burlington and Missouri River Railroad Company. This court endorsed the doctrine of *Meyer* v. *Muscatine*,

supra, and said: "The second proposition submitted is "that the defendant could not borrow money and pur- "chase bonds in aid of the improvement specified in the "ordinance, because such a work is not within the usual "and ordinary objects germain to the establishment of a "municipal corporation, and second, *not a public purpose*, "within the meaning of *that phrase as employed in the* "*charter of the city*. They admit that the construction "of the railroad is a public improvement, and insist that "the phrase "*public purpose*," as employed in the "charter, must be limited to such public purposes as fall "within the usual and ordinary sphere of a municipal cor- "poration, * * * * * * but the theory main- "tained is, that the railroad is nothing more than an im- "proved highway, and that it is open for the legislature "to authorize a municipal corporation to furnish aid in the "construction of the railroad connected with the same as "to construct a highway."

In *Mitchell* v. *Burlington*, 4 Wall., 270, the bonds were issued in aid of a plank road by virtue of like *charter power*, and upon the doctrine of the foregoing cases their validity was sustained. While the general power to issue bonds in aid of railroads was assailed with much force, the rule of construction adopted in these cases analagous to the pending case, was not questioned.

Since writing the foregoing, I have an opportunity of examining the two recent cases cited by plaintiff's counsel.

(1.) *Osborn* v. *Adams County*. This discision was made, of course, with special reference to the corporate power of the county under the Nebraska statute, and was a direct donation—pure and simple—so far as can be gathered from the opinion, in aid of a private individual

enterprise, and *not a work of internal improvement*, as contemplated by the Nebraska statute. It falls directly within the Topeka case and the Kankakee Line Factory case, heretofore referred to, and has no material bearing upon the case at bar.

The case of *Parkersburg* v. *Brown*, is as readily distinguishable from the case at bar. No one can doubt, what is so clearly shown by the exhaustive opinion of the court, delivered by Mr. Justice BLATCHFORD, that under the constitution of Illinois the legislature could not confer upon cities the power to issue bonds and loan money to manufacturers "*carrying on business* in or near the city." It is most astonishing that any one would attempt to defend such a palpable perversion of the purposes of a municipal corporation, making it a private banker to furnish funds to be used by manufacturers for purely private purposes.

This act of the legislature of Nebraska is only exceeded in its absurdity by the act creating a board of commissioners to impose a debt, *in invitum*, upon the city of Ottawa, which my learned friend, Judge Lawrence, labored so vigorously through twenty-four pages of his original argument to defend, and still makes some pretense of adhering to, but the proposition appears to have become so intangible that he can no longer grasp it—but is simply reaching for it.

Suffice it to say, that the distinction between *local aid to utilize the natural local advantages of a city to the end that they may be enjoyed by all classes of the community for the general good, and rendered obtainable at fair rates and without unjust discriminations*, as I have endeavored to show, is quite a different matter from voting aid to private corporations and private persons in

which the general community has but the same incidental interest that it has in the successful prosecution of any single private business of any one of its citizens.

II.

THE UNCONSTITUTIONALITY OF THE ACT OF FEBRUARY 19, 1867, PROVIDING THAT COMMISSIONERS APPOINTED BY THE LEGISLATURE IN VIOLATION OF THE CONSTITUTION OF ILLINOIS OF 1848 MIGHT SUBSCRIBE FOR STOCK IN THE OTTAWA MANUFACTURING COMPANY ON BEHALF OF THE CITY, AND THUS IMPOSE A DEBT IN INVITUM UPON THE CITY. (SEE RECORD, PAGE 20.)

This act, as suggested on page 10 of the original brief, filed by defendant in error in this case, was a mere futile attempt on the part of certain persons interested in this manufacturing company to create a debt *in invitum* against the city of Ottawa, and so manifestly unconstitutional and void, that it was deemed sufficient simply to call the attention of the court to the authorities bearing upon the question of its unconstitutionality. (See page 10 of the printed brief of defendant in error.)

It will be observed that by section 1 of this act the legislature assumed to create certain parties, who do not even appear to be citizens of Ottawa, commissioners to subscribe $100,000 on behalf of the city, to the stock of this manufacturing company, and by section 2 they are authorized to make, execute and dispose of bonds on behalf of the city, to raise the necessary funds to pay such subscription.

By section 3 it was assumed to direct that the city

should levy a tax to discharge this indebtedness, upon the requirement of the commissioners.

By section 4 it is provided how they shall be organized, and what officers they shall appoint, etc.

By section 5 the commissioners were authorized to dispose of the stock and do various other things entirely independent of the control of the municipal government of the city. They were thus assumed to be created a close corporation, over which the city had no more control, except to compel the treasurer thereof to faithfully discharge his duties prescribed by the board, than it had over the board of supervisors of the county.

Not content with creating these commissioners a close corporation, the fourth section authorizes them to appoint *a proxy* to represent them in voting upon the stock so proposed to be subscribed for.

Nevertheless, surprising as it may appear, the distinguished senior counsel for the plaintiff in error (Judge Lawrence who for many years was an honored member of the Supreme court of the State of Illinois, vouchsafed an indorsement of the validity of this monstrosity in the way of legislation, and with great earnestness devoted a large portion of his original brief (viz., pages 64–88) to the maintenance of the proposition that these bonds should have been issued by authority of the commissioners, assumed to be created by this unconstitutional act, in the face of some eight or ten decisions of the Supreme court of Illinois, made mainly while he was a member of that court, uniformly holding such an act to be unconstitutional and void.

The learned counsel now takes a new departure on page 38 of his last opening brief, and now concedes the

want of power of the commissioners to thus impose a debt upon the city, but he still suggests that while it is inoperative as a grant of power, yet it has sufficient vitality to serve his purpose in this emergency. In the language of Lord Elden, it is submitted that this is altogether "too "thin."

In view of the extraordinary position now assumed by the learned counsel and his numerous associates, it is believed that a more particular reference to the cases cited on page 10 of the defendant's original brief, is justifiable.

In *Howard* v. *St. Clair Drain Co.*, 51 Ill., 130, an act was passed for the construction of a levee in St. Clair county—five persons were *named in and appointed by the act commissioners* to construct the levee, etc.

By a subsequent act these commissioners were declared a body corporate, with perpetual succession, etc. (to drain a certain district covering a portion of two counties), with authority to assess and annul tax of $20,000 upon land in the designated district, in proportion to the benefit supposed to accrue, etc.

There was no submission of this act to the people, who had no voice in the control of the company or the selection of its officers.

The learned senior counsel, in delivering the opinion of the court on page 133, says: "The mere statement of "the substance of this extraordinary legislation would "seem almost sufficient, of itself, for a disposition of this "case, but we will briefly declare the grounds upon which "this tax must be held illegal.

"The fifth section of the ninth article of our constitution "(Constitution Illinois, 1848), provides that the corporate "authorities of counties, townships, school districts, cities,

"towns and villages, may be vested with power to assess "and collect taxes for corporate purposes; such taxes to "be uniform in respect to persons and property within "the jurisdiction of the body imposing the same. * * * * "This case presents the question whether it was not also "intended as a limitation upon the power of the legislature "to grant the right of corporate or local taxation to any "other persons than the corporate or local authorities."

Without expressing an opinion as to the right of the legislature to create a district for special purposes in portions of contiguous counties, or on the right to impose a corporate tax for a corporate purpose, nevertheless the learned judge says (page 134): "We are clearly of the "opinion that this clause does forbid the legislature to "grant the power of such local and corporate taxation to "any other persons than the local or corporate authorities; "under our constitution the right of taxation cannot be "granted either to private persons or private corporations."

The learned judge then proceeds to say (p. 134), "that "the reasons for this are two-fold—that this clause was "not in the former constitution, yet the right of the legis- "lature to vest in municipal corporations the power of "taxation for local or corporate purposes was constantly "exercised, and the clause was therefore not inserted in "the constitution of '48, as a necessary grant of power or "to remove a doubt as to its existence," but he continues, "it is therefore a just inference that its purpose was to "define the class of persons to whom the right of taxation "might be granted, and the purpose for which it might "be exercised, and when the legislature seeks to grant it "to *any other than corporate authorities* or for corporate "purposes, it transgresses the limit of its power.

"If the clause in question was not designed as a limita-

"tion of power, no reason can be given why it was inserted "in the constitution at all."

It will be observed that under the act creating commissions to incur the debt in behalf of the city of Ottawa, they are in substance authorized the levy of a tax for its discharge; the municipal authorities performing simply the ministerial duty of attending to the details of the extention of the tax and its collection from the property owners. The drainage act was held void.

Again in *Lovingston* v. *Weider*, 53 Ill., 303, where the legislature authorized the establishment of a police force for the city of East St. Louis and for the appointment by the governor of three commissioners to control the department, who were authorized to estimate the sum necessary to be raised each fiscal year to maintain it, and certify the same to the city council, who were required to provide for the discharge of the same by the issue of certificates, receivable in payment of said taxes.

A bill was filed to restain this proposed action of the commissioners. The same learned judge, in delivering the opinion of the court, said (page 304) that "the valid- "ity of this act can hardly be considered an open question "in this court since the decision of *The People* v. *Mayor* "*of Chicago*, 51 Ill., 17; *Same* v. *Solomon*, *id.*, 37; *Same* "v. *Chicago*, *id.*, 58; and *Harward* v. *St. Clair Drain* "*Co.*, *id.*, 130." It is further said by the learned judge (referring to the foregoing cases): "We further held that "by *corporate authorities* as used in this clause of the "constitution, must be understood *those municipal officers* "*who are either directly elected by the people of the munici-* "*pality or appointed in some mode to which they have* "*given their assent*, are further held, in the first of the "above cited cases, that *the commissioners of Lincoln*

"*Park were not corporate authorities*, and in the last case, "*that the drainage company were not such authorities* "within the meaning of the constitution. These cases, in "our judgment, are conclusive against the validity of the "act under consideration. * * * They (the commissioners) are not elected by the people of that city, "nor appointed in any mode to which the people have "given their assent. * * * By the act in question "*they are fraud upon the people of this municipality.*

"It is said by counsel for appellees that the act in question is not open to this objection, because it does not "give the police commissioners the right to impose a direct tax; but (like the act creating the commissioners "who imposed the debt on the city of Ottawa *in invitum*) "it does the same in substance. It authorizes them to "issue certificates of indebtedness which are made receivable in payment of all taxes or debts due the city, "and, by the amended act of 1869, are convertible into "city bonds on demand of the holder."

That act was held unconstitutional and void.

In harmony with the foregoing is the case of *The People* v. *Mayor*, 51 Ill., 17, which involved the validity of an act of the legislature requiring the mayor, etc., of Chicago to issue bonds on the requirement of the park commissioners for the improvement of Lincoln park.

It was held that no such power could be constitutionally exercised. That the legislature could not compel the city to incur a debt without its consent; and further, section 12 of article 4 of the constitution of Illinois, 1848, which provides that "the governor shall nominate, and by "and with the advice and consent of the senate * * * "appoint all officers whose offices are established by this

"constitution, or which may be created by law, or whose "appointment are not otherwise provided for; *and no* "*such officer shall be appointed or elected by the general* "*assembly.*" Hence the court say (page 32–3): "We do "not think it is within the constitutional competency of "the legislature to delegate this power to these commis- "sioners. * * * We fail to perceive any real differ- "ence, in principle, in forcing this burden upon the city, "and imposing a like burden by the direct action of the "legislature upon individual property owners within it; for "in both cases the bebt, at maturity, must be paid by such "holders, while the accruing interest is a constant drain "upon their resources."

In *The People* v. *Solomon*, 51 Ill., 37, under an act of the legislature, a board of commissioners was constitutionally *appointed by the governor* and confirmed by the senate, and authorized to transmit an estimate of the amount necessary to be raised to pay bonds issued by the board. The distinction between the powers of these commissioners, lawfully appointed under the constitution, and of those assumed to be appointed by an act of the legislature, as in *Gage* v. *Graham*, *People* v. *Mayor*, *&c.*, *supra*, is pointed out very plainly by Mr. J. BREESE (page 51), where he says: "The manifest distinction, in brief, be- "tween this case and that relating to Lincoln Park is "this: In that case, the legislature undertook to compel "the people of Chicago to incur a debt without the con- "sent either of the people of the city or of their corporate "authorities; for it is impossible to hold that the commis- "sioners of that park were corporate authorities of the "city of Chicago. In this case, the people of these three "towns, by voting for the law, have made the commis- "sioners corporate authorities of such towns, and em-

"powered them to assess the requisite tax upon the "property of the towns. The tax is really self-imposed "by means of agents not directly named by the people of "those towns, *but named by the governor by virtue of the "authority conferred by their vote.*"

Gage v. *Graham*, 57 Ill., 144, endorses fully the doctrine of the foregoing cases.

This case was a bill filed to enjoin special assessments levied by the drainage commissioners of Cook county.

After a review of the facts and some of the cases before cited, the court say (p. 147): "It will be perceived "that these officers are not elected or appointed with the "assent of a municipal corporation, nor with the assent of "the persons to be taxed or assessed. *They are appointed "by the legislature, and organized into a private corpora-"tion.*"

See also *Hessler* v. *Drainage Com.*, 53 Ill., 105, to the same effect, in which the court say (p. 113):

"The act in question was never in any mode submitted "to a vote of the inhabitants of the district embraced in "the bill, and the property holders who are to be taxed "have no voice in the control of the company, the selec-"tion of its officers or the imposition of a tax. * * * "*By the term 'corporate authorities' must be understood "those municipal officers who are either directly elected "by the population to be taxed, or appointed in some "mode to which they have given their assent.*"

To the same effect, see *People* v. *Chicago*, 51 Ill., 58.

The doctrine of the foregoing cases was also pronounced in the following cases:

Marshall v. *Silliman*, 61 Ill., 218.

The Town of Middleport v. *Ins. Co.*, 82 Ill., 562.

Barnes v. *Town of Lacon*, 84 Ill., 561.
C., B. & Q. R. R. Co. v. *Aurora*, 99 — 205.
Cairo, &c., R. R. Co. v. *City of Sparta*, 77 Ill., 505.

Notwithstanding the learned counsel has repudiated his original position in his late brief (pages 37–8), now concedes, substantially, that the act upon which he has bestowed so much labor, is unconstitutional in its main purpose, viz., to subscribe to the stock of the Ottawa Manufacturing Company, yet the original position is renewed in the prominent heading to the fifth sub-division of his late opening brief (see page 49), where he again (presumably from force of habit) repeats the proposition, and elaborates it from page 49 to the close of his argument.

But as as the court may possibly be inclined to give some consideration to the authorities cited under his fifth proposition, I beg leave to submit that—

III.

THE CITY IS BOUND BY ITS OWN CONSTRUCTION OF ITS CHARTER POWER IN THIS INSTANCE, AND DETERMINATION AS A MATTER OF FACT, THAT THE PURPOSE FOR WHICH THE BONDS WERE ISSUED WAS A MUNICIPAL PURPOSE, AS SAID BY THE SUPREME COURT OF ILLINOIS, "TO PRO-"MOTE THE GENERAL PROSPERITY AND WELFARE OF THE "MUNICIPALITY."

"It is not universally true that a corporation cannot "bind the corporation beyond what is expressly authorized "in the charter * * * and if a series of contracts have

"been made openly and palpably with the knowledge of "corporators, the *public* have the right to *presume that* "*they are within the scope of their authority* granted. * * "The object of all law is to promote justice and honest "dealing, when it can be done without violating princi- "ple. I cannot perceive that any principle is violated by "holding the corporation liable for the contracts of their "accredited agents, even not expressly authorized, when "those contracts for a series of years were entered into "*publicly and in such manner by neceesary and irresistible* "*implication to be* within the knowledge of the corpora- "tors. * * * But, when to these circumstances we "add, that these corporators themselves *received the vulue* "*of these notes* and contracts in the erection of improve- "ments, and still enjoy the value of them, the conclusion "is irresistible that the corporation ought to pay them. "* * * The debt by positive engagement, is due *ex* "*equo et bono*, in the forum of conscience and in the forum "of law. * * * If they receive the avails and value "of those acts, it is implicit evidence that they consented "to and authorized them; they adopt the act and are re- "sponsible to those who on the faith of such acquiescence "and appropriation, trusted their agents. I speak now "upon the basis of contracts not prohibited by statute."

McClerkin v. *Alleghany City*, 14 Penn. St., 82.

That the construction given to the charter by the city authorities themselves, and their determination that the improvement sought to be aided was a corporate purpose, is conclusive upon the city, is shown by the following cases:

James v. *Milwaukee*, 16 Wall., 159–162.

Adams v. *Lawrence Co.*, per Grier, J., 2 Pittsburg, U. S. C. R., 44–5.

Luling v. *Racine*, Bissel, 314-318-319-320.

Vanhostrup v. *Madison City*, 1 Wall., 291-297.

Meyer v. *Muscatine*, 1 Wall., 373.

The city having voted for the issue of the bonds, and thus given a practical construction of its own charter, and determined that the improvement was a "public purpose," beneficial to the entire community, it is estopped as against *bona fide* purchasers from now denying its authority.

Society for Saving v. *New London*, 29 Conn., 174.

This last case is endorsed by this court in *Moran* v. *Comrs.*, etc., 2 Bla., 272.

Municipal corporations have the same powers of private persons with respect to their contracts, except when by necessary implication restricted.

City of Keithsburgh v. *Frick*, 34 Ill., 405.

City of Galena v. *Corwith*, 48 Ill., 424.

Rumbroth v. *Pittsburg*, 41 Ill., 278.

Moran v. *Ray*, 19 Wall., 468.

All doubts as to their corporate power should be solved in favor of a *bona fide* holder when a *general power exists to execute bonds*, and they are issued under such circumstances of general publicity as to warrant the inference that the purpose of their issue was well known to the citizens generally, the municipality is estopped from questioning their validity after their issue and sale. It is gross negligence—which will not be tolerated—for them to promote the negotiation of their bonds under such circumstances of general publicity without any attempt to enjoin their issue.

In *Ray* v. *VanSycle*, 96 U. S., 687, where a question arose as to the authority of the agent of the municipality to deliver the bonds, this court said: "There is nothing "in the record upon which to base any imputation of col- "lusion or bad faith. * * * * But whatever doubt "exists upon this point should be resolved in favor of the "*bona fide* holders of the bonds. The tax-payers of the "county should not, under the peculiar circumstances of this "case, be now heard to allege that their agents, invested "by statute with the authority and charged with the duty "of protecting their interests, had exceeded their powers." With what force does this rule apply when it is remembered that in ~~March, 1871~~ 1869, these bonds were issued by the city (under its general, unrestricted municipal powers conferred by its charter and on the 11th of March, 1871, the city sanctioned the delivery of the bonds by Cushman to the manufacturing company, and in June following, sanctioned in like manner, the sale of the bonds by the latter to Eames, for the face value and some accrued interest, and after this purchase by Eames, on the 2d of August following, the city paid the annual interest to Eames.

It would be absurd to assume that Eames, when he purchased the bonds, *anticipated* any breach of the contract by Cushman.

He had no connection with Cushman whatever. His purchase was only about three months after the delivery of the bonds by Cushman to the manufacturing company, and while the construction was being prosecuted.

By the payment of the interest to Eames on the 2d of August following (11th finding), the city ratified the transfer of the bonds by Cushman to the manufacturing company, and by the latter to Eames, *and thus recognized Eames' status as a bona fide holder of the bonds*, and most

emphatically thereby said there had been no breach of the contract; *and upon every principle of law and equity is thereby estopped from ever questioning it as against him or Cary, the plaintiff below, as his assignee;* and as *against them for questioning the legitimate municipal* character of the purpose for which the bonds were *issued.* The city had power to borrow money, without restriction as to the amount or purpose, and necessarily the right to determine for itself the municipal purpose of any improvement proposed to be made with the money borrowed, and neither the lender of money upon such negotiable securities (so issued under charter power), nor the purchaser of such securities, was required to investigate the matter as a question of law or question of fact, further than to ascertain that the city had *general corporate power to issue bonds* and *borrow money*, and did assume to do so in pursuance of such corporate power.

The *consideration* for the issue of the bonds was the execution of the contract by Cushman for the construction of the dams. This, and this only, was the "condition "precedent" to the delivery of the bonds to Cushman. The city not only contemplated, but expressly authorized the sale of the bonds, or any other appropriation of them, by Cushman, for the attainment of the desired purpose.

How, then, it is respectfully asked, can it be said that Eames had no right *in June, 1871* (while the contract was still in process of fulfillment—in fact its execution but then just entered upon, and this with the knowledge and approval of the city), and could not then honestly become a purchaser of these bonds. The city, as before remarked, contemplated and expressly authorized a sale of the bonds by Cushman.

It was expressly provided by the contract and assumed

that the proceeds of the bonds *should be used* in the construction of the dams.

Is it not clear, then, as before suggested, that the *consideration* for the bonds was the *executory contract of Cushman's* for the construction of the dams, with a stipulation on his part to return the bonds or their value in case of failure to perform his contruct, or a *pro rata* amount thereof, and that the sole remedy of the city is against Cushman upon his contract if there has been any breach of it? Certainly *no contract* was *entered into* by the city with *Eames at the time of the purchase of these bonds in June, 1871*, that he, Eames, should not be entitled to the money which he paid for them, in case Cushman thereafter failed to perform the conditions of his contract.

Eames was, of course, chargeable with notice of the charter power of the city. The power to borrow money and issue bonds for any public or municipal purpose as given to it, was *ample.*

The city, by its proceedings and ordinances, *assumed to exercise the power in this instance, in pursuance of its charter*, and for municipal purposes; and Eames was assured by the city that it had investigated and determined that question and the purpose for which the money was to be used was in fact and in law a municipal purpose. Eames was not required to investigate the question as to whether the city had the right to expend its funds to promote this particular improvement for the general interests of the community, by developing its natural resources for manufacturing purposes. He had nothing to do with the application of the money, or the propriety or the occasion for its use, and cannot be chargeable with negligence in not doing so.

In *Wilson* v. *Manufacturing Company*, *supra*, (see printed copy of opinion filed herewith, page 29) it is said:

"They (the bonds) were clearly given to him (Cush-
"man) to be expended, as they subsequently were, by the
"company in building the dams across the two rivers.
"His liability under his contract with the city on account
"of the bonds was merely contingent, and absolutely
"ceased when the bonds were thus used and the dams
"completed. Cushman turned over the bonds to the
"company to be used in the manner they were, in consid-
"eration that the company would indemnify him against
"all liability on account of his contract with the city,
"which the company did. * * * The actual trans-
"action between the parties, when relieved of the little
"mist which the argument of counsel throws around it, is
"simply this: The city of Ottawa made a donation of
"$60,000 in bonds, to be applied in building dams across
"the Illinois and Fox rivers, and these dams were built
"by the company, and the funds faithfully applied to that
"purpose, and Cushman and his confederates have re-
"ceived the value of the bonds in the company's stock."

It is said by Mr. J. Harlan, in the opinion recently delivered by him, that the city made no subscription to the stock of the manufacturing company. It had no authority to do so. It is conceded that without special legislative authority it could not do so, and there was none.

Under these circumstances, upon every known principle of law and equity, is not the city estopped from consummating this villainous, unmitigated, shameless fraud and rascality? In all conscience, was it not incumbent upon the tax-payers to enjoin the sale of these bonds to Eames under such circumstances? Could they and the city stand quietly by and sanction this sale to Eames,

made in the utmost good faith (for it is incredible he would have made it, if he had questioned its legality and rightfulness in the slightest degree) and suffer him to pay his money into the hands of its own selected agent for the purpose of being disbursed under a contract made by its own chosen officers, with full indemnity against and misappropriation of the money, and now repudiate the act?

Certainly, as before remarked, no principle of law or equity can uphold such unblushing villainy. The payment by Eames to the manufacturing company, was with the sanction of the city, who had assumed the performance of Cushman's contract (but without any relinquishment of the latter's responsibility) was equivalent to a payment of the money into the city treasury. Can the city keep the money, or permit Cushman or his successors to do so, and refuse to seek their proper remedy against him or them, and ~~defendant~~ Eames? or Defendant Cushman as his Assignee?

The assertion is here made with the utmost confidence that no adjudication of this court, or any other court, can be found that ever gave forth an endorsement of such an iniquity.

Under such circumstances, as said by his Honor, Judge Blodgett, in the court below: "Is it right that a city which "now represents the same citizens who stood by and ac- "quiesced in the issue of these bonds, shall be allowed to "repudiate them in the hands of one of their own citizens, "even, who has paid full value, and whose money has "been, as far as we know, faithfully expended for the pur- "pose which the bonds were designated?"

And Mr. J. Mulkey, in *Wilson* v. *The Manufacturing* "*Co.*, says: "Those dams were built by the company, and "the funds faithfully applied to that purpose."

"When one of two innocent purchasers must suffer a "loss, and one of them has contributed to produce it, the "law throws the burden upon him and not upon the other "party. * * * A corporation is liable for the acts of "its servants, while engaged in the business of their em- "ployment, to the same extent that individuals are liable "under like circumstances." (Citing numerous authorities.)

"The doctrine of *lis pendens* has no application to com- "mercial securities." (Citing numerous authorities.)

Orleans v. *Platt*, 99 U. S., 681–2.

See also, *Block* v. *Commissioners*, 99 U. S., 686.

And it may be said that neither has the doctrine of constructive notice, except as to the sole question of corporate power. It has none as to whether public moneys are to be applied to corporate purposes. If it is sought to apply corporate funds to illigitimate purposes the act may be enjoined, but the commercial securities in the hands of honest purchasers who are disconnected with its disbursement cannot be assailed because the money borrowed was misapplied or improvidently expended.

In *Cromwell* v. *County of Sac*, 96 U. S., 51, this court held that a *bona fide* purchaser of municipal bonds takes them freed from all infirmities, except want of corporate power to issue them, unless he is personally chargeable with fraud in their issue. Mr. Justice Field says (page 59): "The rule has been too long settled to be ques- "tioned now, that whenever negotiable paper has passed "into the hands of a party unaffected by previous infirmi- "ties, its character as an available security is established, "and its holder can transfer it to others with like immu-

"nity. His own title and right would be impaired if any "restrictions were placed upon his power of disposition." (Citing Story, Prom. Notes, Sec. 191.)

See also, *Commissioners* v. *Clark*, 94 U. S., 278.

In *Orleans* v. *Pratt*, 99 U. S., 681–2, this court said:

"In this case a preliminary injunction might and should "have been procured forbidding the commissioners to "issue the bonds, and the railroad company, if it received "them, from parting with them, until the case made by "the *certiorari* was finally brought to a close. This would "have involved only an ordinary exercise of equity juris-"diction." (Citing 8 Paige, 527; 2 Hill, 160.) "The "omission was gross laches. This negligence is the "source of all the difficulties of the plaintiff in error touch-"ing the bonds. The loss, if any shall ensue, will be due, "not to the law or its administration, but to the supineness "of the town and the contestants." (*Ray* v. *Van Sickle*, 96 U. S., 675.

IV.

EAMES WAS A BONA FIDE PURCHASER OF THE BONDS. HE WAS NOT CHARGEABLE WITH CONSTRUCTIVE NOTICE OF ANYTHING BUT THE CHARTER POWER OF THE CITY TO ISSUE THEM; NOT EVEN GROSS NEGLIGENCE; NOTHING SHORT OF POSITIVE FRAUD AND AN ATTEMPT ON HIS PART, IN COLLUSION WITH THE OFFICIALS OF THE CITY TO COMMIT A FRAUD, COULD IMPAIR HIS RIGHT AS A BONA FIDE HOLDER; GROSS NEGLIGENCE, EVEN, ALONE, WOULD NOT AFFECT IT.

Murray v. *Lardner*, 2 Wall., 120–123.

Cromwell v. *Sac Co.*, 96 U. S., 51–57 to 60.

Swift v. *Smith*, Legal News, Jan. 22, 1881, p. 151.
National Bank v. *Crowe*, 60 N. Y., 85.
Sybil v. *National Currency Co.*, 54 N. Y., 288.
Chapman v. *Rowe*, 65 N. Y., 137.
Welch v. *Sage*, 47 N. Y., 143.
Byles on Bills, 115.
Comstock v. *Hannah*, 76 Ills., 530–534.

Eames had the right to rely on the fact that the charter gave the power to the city to borrow money for municipal purposes, and the determination of the city, as before suggested, as to whether it was a municipal purpose for which they proposed to expend it. *Knowing the city had the power*, and *believing* their representations to be true, he was as much a *bona fide* purchaser as were the plaintiffs in the Hackett and Portsmouth bank cases. *Good faith*, under such circumstances, means an *honest purpose*—nothing more. This court, by its own decisions, has, it is respectfully submitted, settled this question in the affirmative in

Goodman v. *Simmons*, 20 How., 343.
Murray v. *Lardner*, 2 Wall., 110.
R. R. Co. v. *Cowdry*, 11 Wall., 459.

The doctrine of these cases is expressly endorsed by the Supreme court of Illinois in *Comstock* v. *Hannah*, 76 Ill., 530–534; where there is *corporate power to borrow* and the securities transferred for value before the maturity, and with an honest belief that the borrower has the right to borrow and expend it for the proposed purposes, this, it is submitted, constitutes *good faith*, because, as said by the court in *Murray* v. *Lardner*, *supra*, "it is a mere ques-

"tion of honesty or dishonesty." The *dishonesty*, in this instance, is not on the part of the lender, but consists in the shameless efforts of the *borrower* to cheat innocent purchasers and honest parties out of their money.

In *McCormick* v. *Street*, 17 Ill., 253, Justice SKINNER says (p. 254): "Good faith, within the meaning of the "statute, is the *opposite* of *fraud* and *bad* faith, and the "presumption of good faith must prevail until the con- "trary is proved fraud is not to be presumed, but "must be proved." (p. 254.)

Every person must, of course, take notice of the statutory requirements, and if a man holds by deed, void for want of execution in conformity to the statute, his title must fail, unless there is some exceptional saving clause; but the statute of Illinois provides that, notwithstanding a person may hold under a deed which is mere *color* of title and void as a legal instrument, and although is chargeable with *constructive notice* of the defective condition of his record title, yet if he purchases in *good faith*, *honestly* believing that he is acquiring a valid title, and holds possession and pays taxes for seven years, he may nevertheless defend his title.

The court, in *Hardin* v. *Gouveneur*, 69 Ill., 143, say: "The question of what is color of title is for the court, it "being a question of law. *Good faith is a question of* "*fact*, and is for the determination of the jury."

Woodward v. *Blanchard*, 16 Ill., 424.

And it is held to be "the opposite of fraud or bad "faith."

In *McCagg* v. *Heacock*, 42 Ill., 57, it was held "that "*bad faith*, as contra-distinguished from *good faith*, is not "established by showing *actual notice of existing claims*

"*or liens of other persons, or of defects which prevent the* "*color of title from being an absolute one.*" (Page 137–8.) This rule was endorsed, and again applied by that court in *Russel* v. *Mandell*, 73 Ill., 136.

In *Winters* v. *Haines*, 84 Ill., 588, the court say: "The "fact that a purchaser may *err in judgment*, or do an *act* "*which another under like circumstances might not do, is* "*not enough to impeach the good faith* of the transaction, "when the purchase is made *with an honest purpose*; al- "though the title is not acquired, *the good faith* cannot be "questioned."

In *Hodgen* v. *Henrichsen*, 85 Ill., 262, it was said: "And the mere fact that the deed, by and of itself, does "not convey a good title, *or, for that matter, any actual* "*title* (*the deed furnishing no evidence upon its face of its* "*insufficiency*, is not alone sufficient evidence *of bad faith* "to overcome the presumption that it was executed in "good faith."

And more recently, in *Smith* v. *Ferguson*, 91 Ill., 307, the court say: "*A defect in the title, if known to Hubbard* "when he purchased, would not be enough to establish "the fact that he was not a purchaser in *good faith.*"

Good faith with respect to the purchase of the bonds by Eames (aside from the question of corporate power), means honesty of purpose or good faith, in the ordinary popular meaning of the term—it cannot mean anything else.

Finally, it is, of course, incumbent upon the city to impeach the good faith of Eames, under whom the defendant in error claims. This can only be done upon an affirmative finding by the court below, that Eames' purchase was in bad faith. There is no such finding in this

record, and for this reason alone the judgment in this case must be affirmed.

V.

The case cited by plaintiff's counsel, viz., *Scipio* v. *Wright*, 101 U. S., 665, has not the remotest bearing upon the questions here involved. That case relates simply to the question of the power of the town to execute and to sell the bonds otherwise than for *their par value*, and as to their right, in view of the statute, to hand them over directly to the corporation in exchange for a like amount of stock, under section 1 of the act relating thereto.

See Laws of N. Y., 1852, p. 393.

That case simply involved the question as to how for this court should be governed by the construction placed upon that particular statute by the Court of Appeals of New York. No such question arises in this case.

In *Town of Venice* v. *Murdock*, 92 U. S., 494, with reference to the general question as to the general right of a town having authority to borrow money for certain improvements, and issue its bonds, to deliver the same *directly to the improvement company instead* of paying the money, this court, as to the binding effect of the New York decisions upon such a question, said (p. 501):

"It is argued, however, that the New York decisions "are judicial constructions of a statute of that state; and, "therefore, that they furnish a rule by which we must "be guided. The argument would have force if the "decisions, in fact, presented a clear case of statutory "construction; but they do not. They are not attempts

"at interpretation. They would apply as well to the "execution of powers or authorities granted by private "persons as they do to the issue of bonds under the "statute.

"They assert general principles, to wit: that persons "empowered to borrow money and give bonds therefor, "for the purpose of paying it to an improvement "company, are not authorized to deliver the bonds directly "to the company—*a doctrine denied in this court*, in the "Superior court of Pennsylvania, and even in the Court "of Appeals of New York."

But the discussion of this proposition is entirely irrelevant to the matter involved in this case.

It is not a question as to whether there has been a compliance with the provisions of any statute relative to the issue and delivery of bonds to an incorporated company for stock, as is apparent from the contract with Cushman and the ordinances and proceedings of the city council; "neither of the ordinances, it will be observed, "designated by name that or any other private company" (*Hackett* v. *Ottawa*, *supra*); nor does the contract with Cushman; but simply a general reference is made to the ordinance of the 30th of July, 1869 (printed record, 34), as follows: "That the said Cushman is authorized and "directed to expend the same in the improvement of the "water-power upon the Illinois and Fox rivers within the "city and in the immediate vicinity thereof, under the "franchises and powers which have been granted for that "purpose by the legislature of the state, or which may "hereafter be granted for that purpose, *in the manner "which, in his judgment, shall best secure the practical "and permanent use of said water-power in the city and "its immediate vicinity.*" And the concluding portion of

the contract with Cushman (printed record, 36) is as follows: "The bonds being appropriated by the city to "*secure the completion of said work, and without other* "*consideration than the public benefit resulting to the city* "*thereby; and it is hereby agreed that nothing in this* "*contract, nor in the ordinances therein* referred to, shall "give to said city any right, title, interest or ownership, "whether in law or equity, in the said improvements when "completed;" from which it is apparent that the allusions to the franchises granted or which might be granted had reference simply *to the fact then well understood, that these dams could not be constructed across the rivers without express legislative authority*, and that if sufficient *legislative authority had not been obtained to authorize their construction*, it was contemplated that *additional legislative authority should be obtained, so* that the desired improvements could be consummated.

Cushman, under this contract with the city, was not directed to perform the work through the agency of the Ottawa Manufacturing Company, of which he was a member. He had the undoubted right, under the authority, to appropriate the funds "in the manner, which in "his judgment shall" (should) best secure a practical and permanent use of said water-power in the city and its immediate vicinity, as provided by the ordinance last named. To effect this object in any matter, and through the employment of any agency, which, in his judgment would best secure the end desired, that is to say, which possessed or should obtain the necessary legislative authority to erect dams across the river.

The city, as before remarked, with respect to the accomplishment of such purpose, under its undoubted charter power possessed all the incidental powers necessary to

its accomplishment, to the same extent that any individual or private corporation could exercise it under similar circumstances.

Cushman took the bonds and impliedly agreed to negotiate them and obtain the money thereon appropriated to complete the desired improvements. This he did, through the agency of the manufacturing company, who took the bonds and sold them to Eames and other parties for their face value and portion of the accrued interest, *and thus the loan was effected.* (See 11th finding, printed record, page 37.)

This court, as early as the case of *Rogers* v. *Burlington*, 3 Wall., 654, said:

"It cannot make any difference, so far as respects this "question, whether the bonds were sold in the market by "their officers, or were first delivered to the company, "and were by their agents sold for the same purpose."

And the same doctrine announced in *Town of Venice* v. *Murdock*, 92 U. S., 494, was also announced by the Supreme court of Illinois in *Decker* v. *Hughes*, 68 Ill., 33 (a case in point, opinion, page 42), and the same ruling, in substance, was made by this court in *Draper* v. *Springfield* (October Term, 1882, No. 159).

It is remarked, in reply to the "4th point" made by counsel for plaintiff in error, that it is not supposed to be seriously made. The statute quoted relates solely to instruments transferred by the payee after due. The note, in *Root* v. *Irwin*, 18 Ill., 148, was transferred *after* it became due.

Suffice it to say that we have the proposition, as made by Judge Lawrence, on pages 46, 47 and 48 of his late brief, negatived by the opinion of this court in the later

case of *Woodworth* v. *Walker*, *in which opinion Judge Lawrence* concurred (p. 137): "If Mary P. Huntoon held "it (the note free from the taint of usury, he (Wood- "worth) by his purchase, succeeded to her rights. A "note tainted with fraud or other infirmity, passing into "the hands of an innocent purchaser, * * * he acquires "it purged of the defense, and any other person acquir- "ing it of him succeeds to his rights in the same condi- "tion he held them.

"A defense to the note in the hands of the original "holder having been thus cut off, is not voided by the "note being again transferred."

The revised statutes of Illinois of 1848—title "Laws"—expressly provides that the common law of England, so far as applicable and of a general nature, and all acts of parliament in aid thereof and to supply the defects of the common law prior to the fourth year of James the First, excepting Ch. 6, 43 Eliz.; Ch. 8, 13 Eliz.; and Ch. 37, Henry VIII, "Shall be the rule of decision, and shall be "considered as of full force until repealed by legislative "authority."

This statute was held, in *Cook* v. *Remick*, 19 Ill., 598, (and which was enacted in R. S., 1874, p. 268,) and in *Thomson* v. *Weller*, 85 Ill., 198, to be held in force, and that it could not be abrogated by judicial construction.

Suffice it to say, however, that the bonds in question, being payable in New York, are governed by the general commercial law of the country, as this court has repeatedly held, and in the recent case. (See *Ottawa* v. *National Bank*, 105 U. S., 3–42.)

The attention of the court is called to the certified copy of the decree and opinion in *Wilson* v. *The Ottawa Manufacturing Company*, heretofore filed, and to printed copies of the same heretofore filed. The case will appear in the 104th Illinois Reports.

The attention of the court is also called to the petition recently filed on behalf of defendant in error. It is not believed that any further elaboration of the main question there particularly discussed is necessary.

Respectfully submitted.

G. S. ELDREDGE,

Counsel for Defendant in Error.

108-110

OFFICE SUPREME COURT U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM. A. D. 1882.

WILLIAM H. CAREY,
Defendant in Error,

ads.

CITY OF OTTAWA,
Plaintiff in Error.

BRIEF AND ARGUMENT

Of JOHN DEAN CATON,
Of Counsel with Defendant in Error.

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Plaintiff in Error.

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Of Counsel with Deft. in Error.

MAY IT PLEASE THE COURT:

I shall not attempt to follow the order of the argument which is presented in behalf of the plaintiff in error, but will in my own way proceed to consider the questions, which, if I understand it, that argument intends to discuss.

The principal question is whether these bonds were issued for a municipal purpose, and there are two minor ones, namely, whether the defendant in error, having received the bonds from Eames after they became due, is under the statute of Illinois to

be considered as a *male fide* purchaser, so as to be answerable for Cushman's laches. And lastly, whether the act of 1857 took from the city authorities all power to provide for the improvement of this water power in any other way.

I propose to consider these two minor questions first.

The counsel quotes the statute of Illinois providing that the assignee of negotiable paper, which is assigned after maturity, is liable to the same defense which could be made had the action been brought by the payee.

In the application of this statute, the fact that Eames, the assignee of the payee of these bonds, and the assignor of the defendant in error, received the bonds long before they fell due, and long before any defense could have arisen to them in the hands of Cushman is overlooked.

This simple statement of fact which is abundantly shown by the record, and found by the Circuit Court, renders a single word of comment from me unnecessary.

I assume to say that this part of the argument was overlooked by the counsel before he officially signed it, or it would have been omitted.

As this is all that is said that can in any way be applied to the question of a failure of consideration of the bonds, nothing more on that question may be properly said.

The second minor question is as to the influence of the act of 1857 upon the powers conferred upon the city by its charter.

It is by no means an improbable inference when we apply our knowledge of human transactions to what is shown in this record, to assume that this

Ottawa Manufacturing Company, having failed to get its hands into the city treasury by other means, procured the passage of this law of 1857, which appointed a board of reputable citizens, who were authorized to subscribe one hundred thousand dollars to the capital stock of this company, and to issue city bonds in payment therefor. These commissioners did not prove as complacent as was no doubt expected, and refused to make the subscription and issue the bonds as authorized, and thus that act became a dead letter.

Now, the contention is, that that act took out of the city charter all authority to deal with that water power matter, either in the mode there pointed out or in any other. That the effect of that law was to bar all other modes of securing to the city the benefits to arise from that improvement, so that if that mode was found impracticable, no other should be resorted to, and the contemplated benefits forever lost. This is carrying a repeal by implication to a most extraordinary length and would lead to most extraordinary consequences. Had the city, after that board had refused to subscribe for the stock, gone on and done so itself and issued these bonds in payment of such subscription, it might be urged with plausibility, that the authority to do so having been conferred upon this board, it was impliedly taken from the city government. If the Legislature deemed this improvement of such importance to the welfare of the city, as to justify a special act for its promotion by which extraordinary means were authorized to accomplish it, it is incredible to suppose that if those means should prove abortive, they designed to forbid the use of all other means to accomplish the intended work.

To attribute to the Legislature a purpose to defeat this work altogether if it could not be accomplished in that particular and unusual mode, is to presume a perversity too discreditable and inconsistent to be rationally admitted. There was no design to repeal any part of the city charter, unless possibly to transfer from the city the right to do the particular act which the Board of Commissioners were empowered to do. All other powers at least were left intact.

It is iterated and reiterated many times, that this was a donation by the city to a private corporation for its own exclusive benefit. Why this mistake of fact was so often made I can not divine, unless it was supposed that a donation to a corporation would be more odious than to an individual, and so create a bias against the case. The fact is, as proved by the whole record, that the city dealt with Cushman alone, and had nothing whatever to do with the Manufacturing Company. Its name even does not occur in the ordinances, or the contract, or in any part of the proceedings preliminary to the issue of the bonds. The city reposed confidence in Cushman, and trusted him alone, and took his covenant alone to insure the proper investment of its money.

But what difference that can make in a legal point of view is beyond my comprehension. If the object for which the appropriation was made was unlawful, then the whole proceeding was unlawful, whether a corporation or an individual was selected to expend the money in furtherance of the object. If the object was a lawful one—one for which the city might lawfully appropriate its money—then the appropriation was lawful, no matter whether a corporation, or Cushman, or the town constable was se-

lected to expend the money, so as the transaction was made in good faith; and it is no matter whether the money was judiciously expended or not, or whether the object designed to be accomplished was accomplished or not. For none of these things were the purchasers responsible. Upon none of them did the legality of the transaction depend.

The whole question of power is centered in this: was the object sought such as the city had a right under its charter, to appropriate its money to accomplish?

This question I propose to meet squarely and without any evasion.

As I have shown on a former occasion the Legislature in granting the charter to the city of Ottawa gave it all of the powers which it was authorized to give by the Constitution, and in the very language of the Constitution, so that it exhausted its powers at once in this regard; and these powers remained and will continue till the Legislature shall see fit to curtail them. No special act could extend those powers.

What is the extent of those powers is a judicial question, and must be defined by the courts, and generally by our own Supreme Court. It has already made many decisions defining these powers in many individual cases, and it will, no doubt, be called upon to make many more upon particular states of fact before it will have finally settled the question, although it may and has laid down general rules on the subject; but there will long be disputes as to whether particular cases come within these rules or not.

The question always has and always will turn upon the extent and the universality of the benefit

expected to arise from the application or expenditure of the money appropriated. I say, upon this must depend the legality of the expenditure or appropriation. Our Supreme Court has settled the law, that it is competent for municipalities to extend their aid by bonuses or subsidies to private corporations and individuals, to aid them in the execution of certain works or improvements which are calculated to confer public benefits upon the communities which are thus burthened, and that it is unlawful to appropriate the pubiic moneys to promote other objects, the benefits of which would not be so general, though they might be advantageous, to a certain extent, to the municipality.

In discussing these questions it will always be observed that the court discusses the measure, or extent, or the universality of the benefit to be derived from the object to promote which the appropriation is made when completed. But in all of these cases the court has the difficult task to perform to determine, mainly by the exercise of its own judgment, founded more on its own knowledge of affairs than from the evidence in the case whether the benefit is sufficient in extent and universality to justify the municipality to thus expend the public money.

It has decided that a railroad does promise such benefits as will justify an expenditure of the public money for its promotion, and that a tavern, a store or a factory, where the owner is to receive all the profits of the enterprise, is not such an object; so has it decided that an appropriation of the money of a municipality for bounties to procure substitutes for drafted men resident within the corporate limits, is of sufficient public benefit and sufficiently universal

to fall within the municipal powers granted by the Legislature, and we must remember that no greater powers could be granted to any municipality than are given to the city of Ottawa.

Now it is manifest that the line of demarkation, the limit of this municipal power, lies somewhere between a railroad and a corner grocery, and that line will never be finally settled till all the gradations between these have been brought before the courts and settled. In each new case as it arises, not precisely like some previous case, the contention will be as to the extent or universality of the benefits to be derived to the municipality by the completion of the work, to promote which the appropriation was made, and whether those benefits are sufficient to justify the municipality in making the appropriation.

Now this court is asked to take the responsibility to determine judicially, that this water power is so insignificant, and the benefits to be derived from it would be so meager and so limited in their extent, that an appropriation for its improvement so that it might be brought into general use, was a usurpation of power not warranted by the constitution of the State—for if the constitution authorized it, then it had the power. This question must be determined with the aid of the facts as disclosed in the record, in the light of its own decisions and of the decisions of the Supreme Court of this State. After all, it is a question—is a mixed question—of fact and of law, and of the former more than the latter. And so was it before the Circuit Court, who decided that the facts were such as to bring it within the rule of law which authorized the city to make the appropriation—that the benefits to be derived from the

improvement, to promote which the appropriation was made, would be so great and so universal as to authorize the city to make the appropriation under its charter.

We may regret that the record does not show more fully the extent of the capabilities of this water power and the probable benefits to the whole community to be reasonably anticipated from it when completed, since that is the very pivot on which this case must turn, and so must be determined by this court; but it is not to be anticipated that you will determine, in the absence of affirmative proof, that they were insufficient to justify the expenditures in the face of the opinion of the Legislature, expressed in the special act of 1857, in the face of the judgment of the Circuit Court, and contrary to the judgment of the people as expressed at the polls when they sanctioned this appropriation.

If the record were silent on the subject we have a right to make any assumption as to the extent of this water power in support of the decision of the Circuit Court. It depends on the degree and extent of the benefits to the community to determine whether the appropriation for its promotion is lawful or not, and no decision has ever defined the limits of that degree and perhaps no decision ever will. Even when the extent of the benefits is absolutely established, and this of itself is impossible to be determined *nunc pro tunc*, for at best it is only possible to obtain the judgments of men as to the influence which any given work may have upon the general prosperity of a city, and yet you must determine judicially the utmost limit of the measure and extent of the benefits which could result from the completion of these works, before you can say that this ap-

propriation was not for municipal purposes; for that must depend upon such measure and limit.

Every private improvement made in a city may confer reflected benefits upon it, while the most important work can do no more except in degree.

It has been decided by our Supreme Court, and is now the settled law of the State, that such reflected benefits to be derived from the construction of a railroad to or through a town, must necessarily be such that it is within the corporate powers which the Legislature may confer upon a municipality, to appropriate public money for its promotion, either by way of donation or subscription to its stock. This power is sustained in view of the probable benefits which the people of the municipality will derive from the work when completed. No man can know with certainty beforehand what the measure of those benefits will actually be. At the very best it can be but a probable guess. From the very nature of the case, this was the most that the court could do, when it announced the principle which must be applicable to all railroad enterprises, and all others which at least promise equal benefits.

It then becomes necessary to compare the promises of this improvement with those of a railroad. The latter is owned and operated exclusively by a private corporation, which receives all the profits which it earns. Such were the rights of Cushman, as secured by his covenant with the city. In the case of a railroad, the inhabitants of the municipality merely have the right to ride, and have their goods transported on the road, on the payment of a reasonable compensation. And here the parallel ends—for the public had greater rights than these in this water-power improvement; for every inhabit-

ant of the place would have the right to use this water-power himself on the payment of a reasonable compensation. Thus the benefits come nearer and more directly to the people than the benefits from a railroad. To bring the railroad up to the standard of utility and convenience of the water-power, it must allow every one to drive upon it himself on paying a just compensation.

Now, if we attempt to calculate the probable influence which the utilization of this immense water-power must exert upon the prosperity and general welfare of the city, the disparity is still greater—vastly greater.

No one who has a knowledge of our country where available water-power is utilized, needs to be told of its value to the community and of the influence it exerts on the prosperity of a city. That of a railroad bears no comparison to it. Every city in the Union may have its railroads, but very few—especially in this western prairie country—can have a water-power. This is the first fall of water of sufficient magnitude to be used as a motor, all the way up the Mississippi and Illinois river valleys, and here we find two of the largest rivers in the State, with one exception, with falls or rapids in each just above their junction which can very readily be brought together with a head of sixteen feet, in the very heart of the city, and upon most favorable ground.

Is this court now to be told, and without a blush, that the utilization of these rare natural advantages would be of less benefit to the city and would less contribute to its general welfare, than would a railroad? A railroad can be extended everywhere, but not so a water-power, which would do more work at

no cost, than could the steam generated by one hundred car loads of coal daily. What would be the action of a prudent and sagacious individual, with the same interests involved as the city had, and with such possibilities?

To this there can be but one answer by every capable mind. If to improve this water-power so as to bring it within the reach of every citizen, and invite millions of capital from abroad, and build up one of the largest manufacturing centres in the West at least, would contribute less to the general welfare than a railroad, then indeed the case of *Johnson* v. *Stark* is not an absolute and controlling authority in this case, how much so ever it may tend to strengthen it, but if it would be of equal or greater advantage, then it is a direct and controlling authority and finally settles it. To compare this improvement with the erection of a tavern bespeaks a grasp of comprehension which I am utterly unable to appreciate.

It magnifies little things and belittles great things till they are brought to a common level in a way that can only be done in a very great extremity.

In *Taylor* v. *Thompson*, also familiar to this court, our Supreme Court went much further in the extension of municipal powers and sustained an appropriation the expenditure of which promised no direct pecuniary benefit to the municipality or any considerable portion of the people. There the municipality assumed a personal burthen which the law imposed upon a very small fraction of the people.

It appropriated money and issued bonds therefor, to hire substitutes to supply a draft made upon the able bodied male inhabitants between specified ages, and even of these but a small fraction was to be drawn. This was a personal burthen imposed upon

a very few of the people, and which did not rest upon a vast majority of the inhabitants who had no direct pecuniary interest in the matter, and yet it was held that the municipal government might assume it and thus impose it upon all; this was done upon the very soundest principles of municipal administration. Many other cases may be supposed where a burthen or calamity falls upon a very few of the community to remove or relieve which the public money may be appropriated.

Such a condition now exists in most of the municipalities along the Ohio river. Who would deny the right of the municipal governments to appropriate money to feed the multitudes who have been driven from their homes and are gathered in churches and in other places for temporary shelter. Yet they are but a small fraction of the whole people, the most of whom can eat their own bread in their own houses. No inquiry need be made whether the sufferers are able to feed themselves or not, for they are not paupers, and as such entitled to relief.

Here, again, comes in a question of extent or magnitude of the calamity, as in the other the question of magnitude and extent of the benefits to result by the improvement must be considered, in order to determine the legality of the appropriation.

If a single individual had been subject to the draft, or if a single individual had been driven from his house by the flood, he might not ask aid of the municipality any more than he who builds a banking house in a city might ask a subsidy to aid him

So may a municipality expend the public money to avert a threatened calamity to any considerable

portion of its inhabitants, as for instance the construction of levees to keep out the water from a considerable part of the town, while it would not be authorized to do this to protect a single dwelling or warehouse where the burthen must fall upon the individual. In the case of calamities or burthens, as in the case of benefits, it is a question of degree and extent, which must necessarily be settled by the courts as a mixed question of law and of fact, and here, too, there is somewhere a dividing line between the greatest and the least which has never yet been found and determined, and no doubt it will be a long time before this is finally done.

If a burthen which rests upon the few may be assumed for all, so, conversely, may an improvement be made by all which will only directly benefit a part, and those in different degrees, as in the case of the railroad.

There is more of sentiment and less of money in the former case than in the latter. The former is, in most cases, temporary, while in the latter it is permanent and lasting.

If we compare the influence which will be exerted by either upon the real, substantial and permanent prosperity and well-being of the city, the measure is infinitely in favor of this improvement.

Take the special improvement under consideration and contemplate the lasting influence it must exert for all time to come, not only upon the city as such, but upon the individuals, to bring into use one hundred thousand horse power of falling water, and all other improvements, which have been or even can be proposed in our State, sink into utter insignificance. To compare this with the relief of fifty or one hundred of its citizens from the burthen

of going to the wars would seem to lack the gravity which should ever be maintained in this presence, and yet to hold that this appropriation was not for municipal purposes you must hold, that the benefits to be derived from its completion as provided for in Cushman's contract, would be less in magnitude and less universal in extent, than was the relief of a very few men from the burthen of the draft, for that is what it comes to when we bring it down to the foundation principle upon which it must rest. When examined in its true light it does seem to me to be asking very much of this court, and more than it will be willing to assume.

It really seems to me that gentlemen do not appreciate the extent of the demand. They seem to lose sight of the advantages which would result to the whole community, both in their individual and aggregate capacity, which the utilization of such immense resources would bring, while others must see a great manufacturing center built up, not only by its own citizens, but by foreign capital which would be invited there, and which would yield in taxes alone, every year, enough to pay this whole loan many times over, but limit their vision to this private manufacturing company, which seems to have been dragged into the case to aim blows at, and which they insist was to be alone benefited. A manufacturing company, indeed, which was never intended to manufacture anything, not even a pair of shoes, and which was really more of a myth than a reality. I suppose, if it had been called a water-power company, it would have been less obnoxious, and perhaps they think that Mr. Cushman would be still less.

But a strenuous effort is made to discredit the

case of *Taylor* v. *Thompson*, which they evidently think must be got rid of somehow. For this purpose they insist that it was made under a pressure of circumstances, which should prevent it from being brought into a precedent. The learned judge who wrote the opinion in that case, which will ever remain as one of the proudest monuments to his learning, sagacity and ability, made no such lame apology for that decision, nor has the same court since found it necessary to apologize for it in any manner, or explain it away, but has stood up to it manfully whenever occasion has occurred, and so I am sure it will do in the future, and so I am sure will this court.

Now what does this disparagement amount to? It boldly asks this court to say that the Supreme Court of Illinois strained a point of law to meet an emergency, and therefore its decision is not the law of Illinois, and that hence you will not recognize it. I feel assured that, even if you doubted the wisdom of that decision, you would wait till our own court showed some signs of weakening upon it, before you would take the responsibility of overturning it. But I feel confident that such an event will never occur; and I feel equally confident that it will meet with your cordial approbation, as it has with the bar of this State so far as I know.

The liberal and enlightened views which prompted that decision evince a grasp of comprehension and a far-reaching foresight which has settled the question of municipal powers in such a way as to strengthen their hands to meet emergencies, and to use the public moneys in a way that will do the most good, and there can be little danger of the abuse of those powers where, as in this and similar

cases, they must be exercised under the correction of the people at the polls. Whoever else may feel called upon to assail that decision, I shall be proud to defend it everywhere, and to do honor to the learned judge who wrote that opinion.

I have already suggested a few of the thousand emergencies which may and will arise where it will be absolutely necessary to invoke the principles of that decision, and where a contrary decision would have resulted in great calamities.

It would have been very unwise indeed had the court cut down and curtailed these municipal powers, till no discretion and no power for good had been left them.

But I have no censure for the gentlemen who made that argument for his effort to discredit this decision. He evidently felt that it must be got rid of somehow in order to save his case, and he has simply and courteously made the best effort he could to do so. But that decision was not born of an emergency, but of the law itself. The procuring of substitutes was not to help the nation, but was an injury to it by so much as a patriotic citizen would make a better soldier than a mercenary tramp who most likely would enlist only to desert and repeat the operation, so a desire to help the country in an emergency could have had no part in the reasons which influenced that decision.

In conclusion, I am afraid to trust myself again to express the detestation I feel at this attempt to repudiate these bonds. That the parties who put none of their own money into this enterprise, but pretended to have authority to issue these bonds, and invited us to put our money into them, and who had the handling of that money, or the direction of

its expenditure, but who now employ counsel to come here and claim that they obtained the money by false pretenses—pretending that they had lawful authority, when they only exercised a usurped power, and so got our money to be squandered, necessarily admitting that they did us a great wrong, and now endeavor to take advantage of that wrong to defraud us of the money we loaned them.

If such is the law, then give it them. But they manifestly expect the court to be astute to find reason to help them consummate their purpose, but I do not believe this court will do so, nor will I believe it until I see its solemn decision to that effect. It will not be made the willing instrument to accomplish such a purpose.

John Dean Eaton
for Deft. in Error

108-110

IN THE

Supreme Court of the United States,

October Term, A. D. 1882.

CITY OF OTTAWA,
Plaintiff in Error,

vs.

WILLIAM H. CAREY,
Defendant in Error.

Error to Circuit Court,
Northern District
of Illinois.

No. 694.

REPLY FOR PLAINTIFF IN ERROR UPON RE-ARGUMENT.

LAWRENCE, CAMPBELL & LAWRENCE,
AND
M. T. MOLONEY
For Plaintiff in Error.

C. B. LAWRENCE,
Of Counsel.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH ST., CHICAGO.

IN THE

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WILLIAM H. CAREY,
Defendant in Error.

Error to Circuit Court, Northern District of Illinois.

Reply for Plaintiff in Error upon Re-Argument.

We avail ourselves of the privilege granted by the court to make a brief reply to the argument of counsel for defendant in error. From beginning to end their argument ignores the fundamental fact in the case, namely: the fact that Eames, the first purchaser of the bonds in question, and Carey, the purchaser from him, after maturity of the bonds, and plaintiff in the court below, both bought with full notice of the purpose for which the bonds were issued, and of all the circumstances attendant upon their issue. This fact, which controls the case, is not once alluded to in the argument of our adversaries; but, on the

contrary, our learned brother, Judge Eldredge, constantly speaks of Eames and his assignee, the plaintiff, as an innocent *bona fide* purchaser, and even says the plaintiff was a purchaser "before maturity."

Thus, in the statement of the case, on page 2 of his argument, he says:

"It is insisted on the part of the defendant in error that the "decision in *Hackett* v. *Ottawa*, *supra*, is decisive of this "case with respect to all the questions now sought "to be raised by the plaintiff in error, because (1) the "plaintiff below was a *bona fide* purchaser of the bonds and "coupons for value before maturity, as in *Hackett* v. "*Ottawa*, *supra*, and had the right to rely implicitly "upon the recitals appearing upon the face of the bonds; "and (2) the city is estopped from denying that it had "lawful authority to issue the bonds, or that the *pur-* "*poses* for which they were issued were not corpor- "ate or municipal purposes and within the power con- "ferred by its charter."

It is somewhat singular to hear counsel who practice in this court maintain that, *as against a purchaser with full notice*, a city "*is estopped* from denying that it had lawful "authority to is suethe bonds, or that the purposes for "which they were issued were not corporate or municipal "purposes and within the power conferred by its charter."

Another extraordiary position of counsel is that while substantially admitting that the bonds in question were issued for an unauthorized and illegal purpose, he insists the city must nevertheless pay the bonds and seek its remedy against Cushman to whom they were issued.

That we may not misrepresent counsel, we give the language of Judge Eldredge from pages 12 and 13 of his argument. He says, speaking of the bonds:

"It is entirely immaterial, as against the plaintiff, "whether Cushman made any lawful or unlawful, or un- "authorized appropriation of them. That is a matter en- "tirely between the city and Cushman, and if the exist- "ing legislation was not sufficient to, or did not authorize "the appropriation of these bonds, when they were thus "issued under the general municipal power of the city, "which is alleged to have been made, and additional leg- "islation was then required to authorize Cushman to "make such an appropriation of them as was contem- "plated by the ordinance, and he appropriated the bonds "before the additional legislation was procured, the city, "as before suggested, has its remedy for the misappropria- "tion under its contract. This is simply a question between "the city and Cushman, and cannot affect the plaintiff's "rights."

We do not desire to consume time in commenting upon this extraordinary position. It assumes that although the bonds were issued for an illegal purpose beyond the power of the city, and although that fact was known to the purchaser of the bonds, and the plaintiff, nevertheless the city must pay this purchaser with notice, and seek its remedy against Cushman, to whom the bonds were issued.

Again, it is said, on page 20 of the same argument:

"The improvement, in aid of which the bonds in ques- "tion were issued, was clearly one for the general ben- "fit of the city proposed to be effected through the "agency of a private corporation, the object being to ob- "tain an addititional supply of water power, and to utilize "it in any manner which would subserve the interests of "the plaintiff, and by which it might have a supply at fair "rates for any and all general purposes, whether to pro-

"pel grist mills, flouring mills, saw mills, or other ma-
"chinery used in connection with any other industrial
"interests."

The city was subserving the interests of the people, *and securing water power for them at fair rates*, by handing over to Cushman, for the benefit of his company, $60,000 in bonds, under a contract which contained this provision: "And it is hereby agreed that nothing in this "contract, nor in the ordinances therein referred to, shall "give to said city any right, title, interest or ownership, "in law or in equity, in the said improvements, when com-"pleted according to the conditions and stipulations herein "contained." We submit, quite an extraordinary method of securing water power at fair rates for the people.

On page 21 of the same brief it is stated: "The dis-"tinction between a *corporate power* and a *corporate pur-"pose* must be kept in view."

There is no such distinction in cases of this sort to be "kept in view." If a city has power to issue bonds at all, and issues them for a corporate purpose, then the bonds are within the corporate power, and are valid; and if they are not issued for a corporate purpose, they are not within the corporate power, and are not valid.

"If an appropriation in aid of a steam grist mill is an "appropriation for a public purpose, certainly an appro-"priation in aid of an enterprise whereby water works "for general domestic purposes, or strictly municipal pur-"poses, or to promote the establishment of grist mills, "flouring mills, and other general objects of industry, "whereby these advantages are secured to an entire com-"munity, are certainly none the less so."

We advise the learned counsel to examine the case of

Osborne v. *The County of Adams*, quoted in our opening argument, and decided at the present term, in which this court held that under an act of the State of Nebraska authorizing counties, cities and precincts of organized counties "to issue bonds to aid in the construction of any rail-"road or other work of internal improvement," there was no power to issue bonds in aid of the construction of a steam grist mill.

In that opinion the court says:

"We are not justified by anything in *Township of* "*Burlington* v. *Beasley*, or in the decisions of the courts "of Nebraska, in holding that a steam or other kind of "grist mill is of the class of internal improvements which "municipal townships in that State were empowered by "the statute in question to aid by an issue of bonds."

On the same page counsel says:

"If it was proposed to issue bonds to pay a stock subscrip-"tion or other extraneous object, it is conceded that such "not being legal in its character, the city could not, in the "exercise of its ordinary corporate powers, exercise its "taxing powers in aid of it without direct legislative "authority."

Here, then, is the broad admission that in order to issue valid bonds in payment of a railway subscription, or for the aid of a railway, there must be express power granted by legislative authority. We have made the same point in our opening argument.

Now, a considerable portion of the argument of our adversary is devoted to showing that the only act of the legislature under which there is any pretense of express legislative authority to issue these bonds, viz.: the act of February 19, 1867, is unconstitutional. In this we per-

fectly agree with counsel on the other side. Where, then, does he get his express legislative authority to issue these bonds, if, as admitted by him, and as decided again and again by the Supreme Court of the State of Illinois, a city with such a charter as that of Ottawa cannot subscribe to the stock of a railroad company without express legislative authority, or issue its bonds in aid of such company? But if a city cannot do this in behalf of a railway company, how much less can it make a donation to a private company for the purpose of enabling that company to create a water power, and farm it out for its own benefit and behoof. If a city cannot subscribe to the stock of a railroad company without express authority, *a fortiori* it cannot *give* the money from its treasury to aid a private company or an individual in the creation of a water power to be owned by such company or individual.

The same learned counsel says, on page 26 of his brief, that "the general power of the city of Ottawa to borrow "money and issue bonds, as stated by Mr. Justice HARLAN, in *Hackett* v. *Ottawa*, 99 U. S., 93, is without "limitation as to the *amount* or *purpose* for which the "same might be done."

Mr. Justice Harlan, in the opinion referred to, did not say that the power of the City of Ottawa to borrow money and issue bonds was without limitation as to the amount or *purpose* for which the same might be done, and it is morally impossible that any member of this court should ever have written such a statement. What the learned judge did say, as shown by the quotation of counsel himself, is this:

"It is clear that the council, having secured the consent "of the requisite majority of voters, might rightfully bor-

"row money upon bonds of the city for *every pur-*
"*pose which could fairly be deemed municipal or corporate.*"

The same learned counsel, upon page 31 of his brief, when speaking of the recently decided case of *Wilson* v. *Manufacturing Company*, to appear in 104 Ill., says:

"The determination of the Supreme Court of Illinois "in this case, under the rule of decision in this court, is "and ought to be conclusive upon the question of the au-"thority of the city to issue the bonds involved for the "purposes for which they were issued."

In our opening argument we ventured to assert that the citation of this case, as authority in the present one, was almost laughable. Judge Eldredge does not seem to like this expression, but we must still insist that the citation of this case as authority in the one under consideration is very extraordinary in such a court as this. As we have said in our opening argument, the case cited has not the remotest bearing upon the validity of the bonds under consideration. The City of Ottawa was not a party to the suit; the question of the validity of the bonds was never raised, and had no relation whatever to that controversy, which was simply an attempt by a creditor of the manufacturing company to compel the stockholders of the company to pay up their stock, and pay him his debt. To cite the case as authority is absurd.

On page 54 of the argument by Judge Eldredge, it is stated:

"By the payment of the interest to Eames on the second "of August following, the city ratified the transfer of the "bonds by Cushman to the manufacturing company, and "by the latter to Eames, and thus recognized Eames' "status as a *bona fide* holder of the bonds, and most em-

"phatically thereby said there had been no breach of the "contract, and upon every principle of law and equity is "thereby estopped from ever questioning it as against "him or Carey, the plaintiff, as his assignee, and as "against them from questioning the legitimate municipal "character of the purpose for which the bonds were "issued."

All this is sufficiently disposed of by the language of this court in *City of Parkersburg* v. *Brown*, of the present term, as follows:

"There having been a total want of power to issue the "bonds originally, under any circumstances, and not a "mere failure to comply with prescribed requirements or "conditions, the case is not one for applying to the city "under any state of facts any doctrine of estoppel or rati-"fication by reason of its having paid some instalments "of interest on the bonds."

* * * * * * *

"No such acts can give validity to the statute or to the "bonds."

Moreover an estoppel *in pais* is always personal, and does not enure to an assignee; hence none can be invoked in favor of Carey because interest had been paid, unless it was paid up to the time of his purchase, and the paper then not dishonored; the fact here is that for years payment of interest had been withheld on the ground that the bonds were not valid.

Judge Eldredge intimated in his argument that we have changed our position from that which we occupied in the argument of last term. He is mistaken. Our position has been, from the first, that the act of February 19, 1867, entitled "An act to authorize the city of Ottawa to

"subscribe to the stock of the Ottawa Manufacturing Com-
"pany," was, in so far as it attempted to give such power to the city, unconstitutional, and that the general grant contained in the charter, of a power to borrow money, and issue bonds, did not give to the city the power to issue the bonds in question, because such bonds were not issued for a corporate purpose.

In the answer to our argument of last term, there was a brief admission that the act of 1867 was unconstitutional, but not until the present argument have counsel come forward, and confessed themselves compelled to acknowledge that they can claim nothing under the act of 1867. To this complexion they have come at last, and we gladly accept their admission, but must still insist that while the act of 1867 gave no power whatever to do what the city has really done, it must be considered as at least an expression of the legislative will, and so far valid, that the city of Ottawa, if it seeks to issue bonds at all for the purpose of improving the water power of the Illinois and Fox rivers, must do so, not by way of adonation to a private manufacturing company, but by way of subscribing to its stock an amount equal to the sum contributed by the city.

The legislature assumed it had the power to authorize the city of Ottawa to issue bonds for the purpose named in the act. As a matter of fact, it had no such power. But if it had had the power to confer this authority on the city of Ottawa, it said in substance to that city:

"Your common council shall not control these bonds
"when issued. The commissioners named in this act shall
"control them, and they shall dispose of them at not less
"than their par value, and invest the proceeds in the
"capital stock of the Ottawa Manufacturing Company,

" and hold or sell said stock for the benefit of said city, at " their discretion."

We claim that if a power to issue these bonds could be considered as granted by the original charter of the city, the act in question would have at least this effect; it would be such a modification of the original charter as to take away from the city the power to issue such bonds, if the charter had granted it, except with the concurrence of the commissioners named in the act, and for the purpose of delivering the bonds to the commissioners to be sold by them and the proceeds invested by them in the stock of the company which should remain under their control, as trustees for the city.

Suppose the act of 1867 had been passed for the purpose of enabling the city of Ottawa to issue bonds for some object confessedly corporate in its character? Suppose further the act had contained the same provisions with the act under consideration. What would be the effect upon the power of the city? Clearly this: It would be necessary for the city, in issuing the bonds, to comply with the requirements of the special law regulating their issue.

It could not say "we have power to issue these "bonds under our charter, and we will therefore disre- "gard the requirements of the special law;"

It could not say, "we know the special act requires " the council to obtain the assent of certain persons named " in the act, before it issues the bonds, but we will never- " theless issue them, without obtaining such assent;"

It could not say, " we know the special act requires us "to issue these bonds only in exchange for stock in the "company to which the bonds were to be issued, but we

"will make the company a present of these bonds, and "issue them as a donation."

It seems evident that if, as our adversaries claim, these bonds were issued for a corporate purpose, then the act of 1867 is so far in force that the bonds, when issued, could be used only with the consent of the commissioners named in the act, and in the manner directed by the act, and for the purposes of subscription and not donation. Our adversaries are in this dilemma. The bonds were or were not issued for a corporate purpose. If they were not issued for such a purpose, they are void. If they were issued for a corporate purpose, then the act of 1867 would control in all matters relating to the disposition of the bonds when issued; and the council had no power whatever to deliver the bonds to Cushman without the consent of the commissioners named in the act, nor to make a donation of them, nor to use them for any purpose except to deliver them to the commissioners to sell them at not less than par value, and use the money in paying for the stock of the Ottawa Manufacturing Company.

We respectfully submit on one of the horns of this dilemma the plaintiff must be impaled.

The argument of our learned adversary, Judge Caton, is an attempt to show that while a city donation to a private corporation or individual to aid in building a paper mill or a rolling mill or any other specific enterprise, would be confessedly *ultra vires* and therefore illegal, yet a donation to a private corporation or individual to aid in the erection of a water power is a different thing, and would not be illegal.

We assert, on the other hand, that the aid given to build a rolling mill is less objectionable than aid to create

a water power to be itself owned, as in the present case, by a private corporation or individual.

A water power is of no benefit to a city unless it is utilized for the purpose of manufacturing. To give money, then, to a private corporation for the purpose of enabling it to create a water power to be owned by itself is more objectionable than to give money to aid directly in the erection of mills, because the money is given to the creation of the water power only, in order that the mills may be erected. The mills are the objective point. It is the mills and not the water power that bring trade to a town, and therefore in giving aid directly to the mill-builder the city is giving for a purpose one link nearer the anticipated benefit to itself than when it gives merely to the creation of a water power. Counsel say they agree with the decision of the present term in the Parkersbug case, because the legislature there had granted power to the city to lend its bonds directly to persons engaged in the business of manufacturing in or near the city; but the bonds were only to be loaned, and not even loaned until thirty-five per cent. of the amount to be invested by the manufacturers had been paid in, and security for repayment was to be taken on the property.

This, then, was a law authorizing loans to be made only to manufacturing establishments already begun, and with thirty-five per cent. of their capital paid in. But in the case at bar the bonds were given to Cushman merely for the purpose of enabling him or the Ottawa Manufacturing Company, of which he was the chief corporator, to create a water power by means of which, in God's good providence, some man might in years to come, be induced to build a mill, but which water power never was, in fact, created, and the time to build a mill, as shown by the rec-

ord, never came. Is it not, then, very illogical, and even very absurd, to take the ground that while a city cannot lend money on security to aid a *de facto* manufacturing enterprise having an actual existence, it may *give* money to a corporation or individual to be expended in an attempt to create a water power in the hope that at some future day and in the event of success in creating the power, mills will be built and operated.

It is morally impossible that the court should say that a loan of sixty thousand dollars, to aid manufacturing establishments in actual existence in the city of Ottawa (which is the Parkersburg case), would be illegal, but that a donation of sixty thousand dollars to Cushman or the Ottawa Manufacturing Company, to aid in the creation of a water power, in the hope that this would lead to an increase of such manufacturing establishments, would be legal and proper.

Both of the opposing counsel speak of the scheme for creating the water power as if it were to be created for the common benefit of the public, when it was in fact to be owned exclusively by Cushman or his corporation, and the city was never to derive a dollar of income from its use, or have any voice in its management. We again quote the language of the contract between the city and Cushman:

"And it is hereby agreed that nothing in this contract, "nor in the ordinances therein referred to, shall give to "said city any right, title, interest or ownership, whether "in law or in equity, in the said improvements when "completed, according to the conditions and stipulations "herein contained."

In the argument of Judge Caton, the question of the power of the city to issue bonds in aid of any object is

said to turn upon the extent and universality of the benefit expected to arise from the application or expenditure of the money appropriated, and that the line of demarcation or limit of municipal power lies somewhere between a railroad and a corner grocery; it being conceded by him, that although the Supreme Court of Illinois has held the aiding in the building of a railroad, or the payment of bounties to volunteers to fill a quota of troops which a certain municipality was obliged to furnish to the general government, to be corporate purposes, a tavern, store or factory, where the owner is to receive all the profits of the enterprise, is not such an object.

He then proceeds to consider, from this standpoint, whether the case at bar is located nearer the railroad or the grocery, and draws a partial parallel between the case of a railroad and that of the donation in question. But even in so doing, he disregards the salient fact that the books do not contain a case where it has been held that a municipal corporation can make a donation to aid the building of a railroad without *express* legislative authority so to do; and this he cannot find in the charter of Ottawa, except as amended by the acts referring to the Ottawa Manufacturing Company, which are claimed by counsel for defendant in error to have nothing to do with the case. The only parallelism which counsel discovers between the two cases we are considering, consists in the fact that the railroad, like the donee of the bonds in suit, receives all the profit which it earns.

We agree that this is the extent of the likeness, but the angle of divergence seems to us to be directly opposite from that which is stated by counsel. He says that the public have greater rights in the water power improvement than in the case of a railroad, because, while all the inhabitants

of a municipality have the right to be carried, or have their goods transported, on the road on payment of a reasonable compensation, on the other hand, every inhabitant of the place would have the right to use this water power *himself*, on the payment of a reasonable compensation.

If this statement of fact were correct, the illustration might have some force, because one of the grounds upon which the aiding in the building of a railroad by a municipality can be maintained is, that each one of the inhabitants has the right to *insist* upon, and *compel*, transportation of himself or his goods, however much the corporation might wish not to accommodate him.

And in the case of *Burlington* v. *Beasly*, 94 U. S., we find the same principle relied upon, inasmuch as the law of Kansas provided that the grinding mill there in question was a public mill, and regulated by the statutes of the state, so that every one who might choose had a right to *compel* the miller to receive and grind his grist in the order in which it was received, and that the legislature had the right to prescribe the rates of toll.

But, as a matter of fact in this case, counsel are mistaken in asserting that every one would have the right to use this water power *himself* on payment of reasonable compensation. There was nothing in the charter of the Ottawa Manufacturing Company nor any provision by way of contract with the city which gave any such right; the corporation was merely a private corporation; it was, as is conceded, entitled to all the profits which it might earn; and there is no rule of common law that compels the owner of a water power to allow any one to come and use it, even although the carrying out of such person's plans for building might actually benefit the owner of the water power or those in its vicinity. The

owner of a water power, like the owner of any other piece of land, has the right, if he wishes, to preserve it in a state of nature, and no one can insist upon improving it against the owner's will. Moreover, it is impossible that all could use it, since as soon as any part of it should be appropriated by one person there would be an entire and permanent exclusion of everybody else, so that as soon as the limit of the water power was once reached the enjoyment of it would still be confined to a limited nnmber of persons, and its use would not be open to the community at large, as is the shifting and non-exclusive use of a railroad or public mill to different individuals.

In view of the fact that there would be no duty resting upon Cushman or the owners of the water power to lease or sell even so much as might be necessary for a single run of stone to any person which could be enforced by law, but that the only moving reason for such a grant would be the pecuniary advantages to the owner, it seems to us that the case is more like that of the corner grocery, the proprietor of which may sell his wares, or refuse to sell them, to whom he pleases.

Much reference is made by counsel to the case of *Taylor* v. *Thompson*. That case might well have been rested upon only one of the propositions upon which it is based, which is stated in the opinion as follows:

"Under the system of drafting adopted by the Federal "government, each city and township in the state was as- "sessed for its respective quota of men. It was deter- "mined what amount of military service was due to the "government from each municipal community, under the "acts of congress, to which all owed obedience. The "rendition of this service was a burden resting on the en-

"tire community, and no more due from one individual mem-
"ber of it than from another. * * * * * * The
"tax is levied, not for the benefit of the volunteers, who
"receive its proceeds, but for that of the community to
"which it brings relief."

It is also stated in that opinion that:

"We must not, however, be understood as expressing
"any opinion as to that portion of the law which author-
"izes the payment of a bounty to men already drafted."

But we wish to call the attention of counsel, who take so much pleasure in the case, to the following paragraph of that opinion:

"So, too, if a tax was levied, in order that its proceeds
"might be paid over as a gratuity to some individual who
"enjoyed, for the time being, the favor of the multitude,
"there would be no pretense for calling it a tax for mu-
"nicipal or corporate purposes."

On page 57 of the argument of Judge Eldredge we find the municipal authorities of the city of Ottawa charged with "villainous, unmitigated, shameless fraud and ras-
"cality," and on page 58 they are mildly charged with "unblushing villainy."

We respectfully submit there is something too much of this. The city council of Ottawa is defending against these bonds because it is its official duty to do so. The bonds were issued in plain violation of the constitution of the state, by way of gift to a private corporation. Believing, as the city council does, and as it has been professionally advised, that the imposition of a tax for the payment of these bonds would be an illegal tax, it becomes at once its legal and moral official duty to submit this question to the courts.

"v. *Same*, 4 Wall., 270, are to the same effect. But in "all these cases there was found by the court to be an "express legislative authority for the corporation to do "what it had assumed to do.

"The principle running through all the cases where "these bonds have been sustained being, that the legisla- "ture had made the object for which the debt was created "a '*corporate purpose*' within the meaning of the con- "stitution; but I find no case going so far as to uphold "an issue of bonds by a municipality in aid of even a "*quasi* public enterprise in the hands of a corporation or "individuals, unless there was an express or necessarily "implied delegation of authority to issue such bonds, or "levy a tax.

"The charter of the defendant city clothes its common "council with various powers and duties, such as main- "taining and improving streets and alleys, building school "houses and maintaining schools, to provide for lighting "the streets of the city, to establish hospitals, and adopt "sanitary measures, adopt a system of sewerage, to sus- "tain a police, etc., etc.

"These are all corporate purposes. That is, the cor- "poration was created to accomplish these purposes, and "I do not intend to be understood as saying that the leg- "islature might not have delegated to this city council the "right to make a donation to Mr. Cushman or the manu- "facturing company in its enterprise of developing the "water power of the Fox and Illinois rivers, because that "question is not now before us. But it is admitted that "no such express delegation of power was made. I am, "therefore, of opinion that there was no power in the city "council to issue the bonds."

Hackett v. *Ottawa*, 11 Chicago Legal News, 82.

The court then went on to decide that although the plaintiffs in that case were purchasers without actual notice, they nevertheless must be held to have had constructive notice from the recitals on the face of the bonds. It was on this last point that the decision of Judge Blodgett was reversed in this court, and a decision of the question of corporate purpose was expressly reserved. The court says: "The direct decision of that question "does not seem to be essential to the disposition of this "case. We content ourselves with stating the proposi- "tions which counsel have urged upon further considera- "tion, and without expressing any settled opinion as to "what are corporate purposes within the meaning of the "Illinois constitution, we pass to another point which, in "our judgment, is fatal to the defense."

This court is therefore without any embarrassment arising from its decision in the Hackett case, as that case was decided on the ground that Hackett was an innocent purchaser, without knowledge of the purpose for which the bonds in question were issued, while in the present case both Eames, the first purchaser, and Carey, the plaintiff, bought with full knowledge of the purpose for which the bonds were issued to Cushman, and with full knowledge of all the circumstances attendant upon their issue.

Judge Blodgett was perfectly correct in asserting, as he does, in the foregoing extract from his opinion, and referring to *Thompson* v. *Taylor*, *Rogers* v. *Burlington*, and *Mitchell* v. *Same*, *supra*, "in all these cases there "was found by the court to be an *express legislative* "*authority* for the corporation to do what it had assumed "to do."

All the cases in all the courts agree that bonds